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The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the 'Personality' Excuse

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The Demise of Circumstantial Proof in Employment Discrimination Litigation: *St. Mary's Honor Center v. Hicks*, Pretext, and the "Personality" Excuse

Mark S. Brodin*

Since the enactment of Title VII of the Civil Rights Act of 1964 the courts have struggled to define the burdens of proof surrounding the central issue of an employer's alleged discriminatory intent. What evolved was the McDonnell Douglas framework, premised upon established concepts of circumstantial proof and inference. The approach permits plaintiffs lacking direct proof to nonetheless establish a violation of the Act by proving that the employer's explanation of the challenged decision was pretextual.

In St. Mary's Honor Center v. Hicks, a closely-divided Supreme Court substantially altered the McDonnell Douglas framework. Discrediting the reasons offered by the employer for its decision no longer suffices to establish a violation of Title VII. Rather, plaintiffs must somehow prove that the pretext was offered to hide discrimination, and not for some other motivation. Moreover, the trier of fact is permitted to construct its own explanation of the events even though that scenario was not offered by either party at trial. As a result, plaintiffs must be prepared to discredit stated and unstated non-discriminatory reasons for the employer's action.

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Professor Brodin criticizes the sharp move away from McDonnell Douglas and argues that it will distort the fact-finding process and deprive victims of bias of a meaningful opportunity to enforce their rights to equal employment opportunity.

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We have witnessed hard-won decisions, intended to protect basic rights of black citizens from racial discrimination, lose their vitality before they could be enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or more sophisticated form. In many respects, the civil rights cases and laws of the 1950's and 1960's are facing a fate quite similar to civil rights measures fashioned to protect the rights of blacks during an earlier racial reconstruction period more than a century ago."¹

One wonders whether the majority [of the Court] still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."²

I INTRODUCTION

No fact issue is more elusive in a courtroom than one involving an actor's state of mind. One such issue, the motivation behind a personnel decision, is central to employment discrimination cases alleging intentional disparate treatment. It is not surprising, then, that the problem of determining the reasons underlying an employer's challenged decision has occupied the courts since the enactment of Title VII of the Civil Rights Act of 1964.³

1. DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* § 5.3, at xxiii (2d ed. 1980).
 2. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).
 3. 42 U.S.C. § 2000e.

Recognizing that direct evidence of discriminatory intent is rare, the United States Supreme Court developed a methodology of circumstantial proof founded on the concepts of the *prima facie* case and pretext. According to the *McDonnell Douglas/Burdine* framework,⁴ the plaintiff must initially prove facts raising a *prima facie* suspicion of discrimination, thereby requiring the employer to come forward with a non-discriminatory explanation for the decision. If the plaintiff then succeeds in discrediting this explanation, the employer is presumed to have offered it as a pretext to conceal its discriminatory tracks and is consequently adjudged in violation of the Act.

The approach followed for two decades was dramatically altered by the Court in *St. Mary's Honor Center v. Hicks*.⁵ At the bench trial challenging his termination as shift commander at a Missouri correctional facility, Melvin Hicks painted a broad picture of racially-motivated decision-making and, further, discredited the explanation offered by St. Mary's for his discharge. The United States District Court nonetheless entered judgment for the employer finding that, while Hicks had proven that there had been a "crusade" against him at the workplace, he had not affirmatively proven that the crusade was racially rather than "personally" motivated.⁶ St. Mary's had not raised at trial the possibility of a personality conflict nor offered any evidence to suggest it.

A closely divided Supreme Court (per Scalia, J.) adopted the District Court's approach. Under the new regime it is no longer sufficient for a plaintiff to demonstrate that the employer's justification is pretextual. It is now necessary to prove somehow that the false reasons were offered as an alibi for discrimination, as opposed to *some other possible* hidden motivation. *Hicks* permits the factfinder, in a marked departure from the traditional adversary model, to look beyond the presentations of the litigants to find that *other* reason. The Court has, in effect, placed upon plaintiffs in Title VII actions the burden of proving discrimination *beyond any doubt*.

Hicks is only the latest in a series of Supreme Court pronouncements beginning with the 1988 Term which have dismantled the long-standing structure of Title VII⁷ and led in 1991 to congressional action to restore the

4. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

5. 509 U.S. 502 (1993).

6. See *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1251-52 (E.D. Mo. 1991).

7. See generally Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990) (arguing that Court opinions in the 1988-1989 term substantially curtailed the reach of Title VII); Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1 (1989) (asserting that a fundamental change in the Court's interpretation of Title VII occurred in the 1988 term). The trend may reflect the influence of the "Law and Economics" school. See, e.g., RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing that Title VII has interfered in the free market's natural competitive forces working against discrimination).

law's effectiveness.⁸ Now in the waning years of the century the foremost contribution to the legal struggle for workplace equality is again in danger of being rendered ineffective with regard to its most basic protection—against deliberate (but covert) discrimination. Those plaintiffs lacking “smoking gun” evidence are denied by *Hicks* a realistic opportunity to enforce Title VII. Equally troubling, the Court's ready acceptance of a “personality clash” as a non-discriminatory justification ignores the effects of unconscious bias and stereotyping and opens a gaping loophole in the law. What all this reflects is a fundamental change in the Court's mindset regarding the problem of discrimination, as the quotation from Justice Blackmun set out above suggests.

Hicks comes at a particularly inauspicious juncture because, with the amendments to Title VII adopted in 1991, the decision-maker will now (at the request of any party) be a jury and not a judge.⁹ While many no doubt welcome this democratization of the litigation process,¹⁰ the change also means that the deliberations have been moved behind closed doors. Without the benefit of the written findings of fact and conclusions of law required of the judge at a bench trial, whatever assurance we once had that decisions in Title VII cases would be reasonable and based on the record evidence (or could at least be exposed for not being so) is lost. The litigation fishbowl has become opaque, and the potential for jury nullification becomes a real prospect.

This article uses *St. Mary's Honor Center v. Hicks* as the vehicle for exploring the formidable challenge of proving discriminatory intent. The first section develops the vital role played by circumstantial evidence and the *McDonnell Douglas/Burdine* framework. The second section traces the *Hicks* litigation and the radical transformation wrought by it. The third section critiques the Court's approach: First, the majority mistakenly discounts the probative force of a plaintiff's demonstration that the employer's defense was pretextual. Second, by permitting the factfinder to adopt a scenario that neither party has offered at trial, the Court misunderstands and distorts the adversary process. Third, the legitimization of the “personality” defense ignores the subtle realities of the discrimination phenomenon as documented in the social science literature. Fourth, the *Hicks* conception of proof is unworkable as a guide to the resolution of employment discrimination disputes. Lastly, the article places *Hicks* in the context of an emerging

8. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a).

9. See *id.* A party may invoke the new right to jury trial whenever compensatory or punitive damages are sought by plaintiff. 42 U.S.C. §1981a(c).

10. But see Roy L. Brooks, *A Critical Race Theory Critique of the Right to a Jury Trial Under Title VII*, 5 U. FLA. J.L. & PUB. POL'Y. 159, 163, 165-67 (1993) (speculating that critical race theorists would find that the jury trial amendment opens an avenue for the racism of jurors).

judicial reaction against reliance on circumstantial proof in civil rights litigation.

II

THE PROBLEM OF PROOF AND THE *McDONNELL DOUGLAS* SOLUTION

Disparate treatment is, as has been often observed, "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]."¹¹ This form of workplace offense was the main target of Title VII when it was debated and adopted by Congress in 1964.¹²

The central issue to be resolved in the disparate treatment lawsuit is whether the challenged action was taken for permissible or impermissible reasons. "[L]iability depends on whether the protected trait . . . actually motivated the employer's decision."¹³ Leaving aside those rare cases where the employer relies upon a "formal, facially discriminatory policy requiring adverse treatment of employees with that trait,"¹⁴ the employer's motivation¹⁵ will inevitably be surreptitious. "There will seldom be 'eyewitness' testimony as to the employer's mental processes."¹⁶ "Unless the employer

11. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (alteration in original) (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

12. "Disparate treatment" is to be contrasted with the less intuitive and more controversial concept of "disparate impact," which involves employment practices "that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* Disparate impact cases do not require proof of discriminatory motive. *See id.*

13. *Id.* at 610. As defined in the social science literature, "prejudice" refers to the prejudgment of others based on a negative perception of a group culturally different from the actor's. "Discrimination" represents the actions taken based on the prejudice. *See generally* OTTO KLINEBERG & J. MILTON YINGER, *Prejudice*, 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 439 (1968). The classic work in the field is Gordon Allport's *THE NATURE OF PREJUDICE* (1954).

14. *Biggins*, 507 U.S. at 610. Examples include an outright exclusion of females or pregnant workers from the job.

15. "Motivation" refers to the underlying reason(s) prompting the actor, as compared with the concept of "intent," which in the law generally refers to the deliberate nature of the act. *See generally* Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 978-85 [hereinafter Brodin, *Fault and Motive*]; D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 734, 736-40 (1987). Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 70-96 (1991) (attempts to define discrimination without reference to motive, intent, or causation.) *See also* *Com. v. Luna*, 641 N.E.2d 1050, 1053 (Mass. 1994) ("the modern definition is that 'wilful means intentional' without making reference to any evil intent").

It should be noted that the prevailing model of disparate treatment discrimination premised on intentional conduct has come under increasing attack in recent years. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1216-17 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *The Id, the Ego, and Equal Protection*]; Welch at 740-62.

16. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). *See also* *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1563 (11th Cir. 1995) (Johnson, C.J., concur-

is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree."¹⁷ The closest thing to "direct" proof in this context is evidence of statements made by the decision-maker reflecting bias against the group to which the plaintiff belongs.¹⁸

How then does a plaintiff prove unlawful motivation in the face of the employer's denial, the kind of state-of-mind issue Jerome Frank referred to as a "wild fact?"¹⁹ The courts have long recognized that discriminatory motive "can in some situations be inferred from the mere fact of difference in treatment."²⁰ The precise methodology for circumstantial proof was set out by the Supreme Court in two unanimous decisions.

*McDonnell Douglas Corp. v. Green*²¹ and *Texas Department of Community Affairs v. Burdine*²² placed upon the Title VII plaintiff the initial

ring) ("[E]vidence of invidious discrimination will not generally be preserved in the files of the employer . . ."); *Kimberlin v. Quinlan*, 6 F.3d 789, 809 (D.C. Cir. 1993), *vacated and remanded on other grounds*, 115 S. Ct. 2552 (1995) (Edwards, J., dissenting) ("It is also well-recognized that, in almost any claim involving motive, a defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive."). Thus the "principal reason for reliance upon circumstantial evidence rather than direct evidence in employment discrimination cases is the virtually unanimous recognition that direct evidence of discriminatory intent is seldom available . . ." Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 16 (1986).

17. *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 638 (5th Cir. 1985). Complex issues involving state of mind are of course not limited to discrimination cases, but appear in myriad contexts. Beyond the obvious examples in criminal law, such issues appear in even the most mundane civil litigations. In *Mulford v. Mangano*, 636 N.E.2d 272 (Mass. 1994), for example, the issue was whether the workers' compensation rule of co-employee immunity barred the tort action by the restaurant dishwasher against the cook. The legal question was whether the cook had come to the restaurant on the day he was injured for job-related or non-job related reasons. *See id.* at 275. The Court recognized that the employee's own testimony concerning his purpose could not be deemed determinative because (to put it politely) "circumstances may tend to lead the employee to opt for the answer, which, in an after-the-fact assessment, appears more likely to benefit him financially." *Id.* at 276. The Court thus adopted "a more objective test which assesses what the employee did and other facts in order to determine whether he acted at least in part for a job-related purpose." *Id.*

For a cynical view of how lawyers litigate issues of state of mind, see generally *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 94 (David Luban ed., 1983).

18. *See Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885, 889-90 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975) (statements concerning "colored folks" by plaintiffs' supervisor). The usual meaning of direct proof, *i.e.*, evidence that actually asserts or demonstrates the proposition to be proven and which, if believed, proves the proposition without reliance upon inference or presumption, does not really apply here. *See generally* 1A WIGMORE ON EVIDENCE § 24 (1983 Tillers rev.).

19. *Quoted in* WILLIAM TWINING & TERENCE ANDERSON, *ANALYSIS OF EVIDENCE* 173 (1991).

20. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). *See also* *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3d Cir. 1996) ("Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence."); *Com. v. Stoddard*, 644 N.E.2d 234, 236-37 (Mass. App. Ct. 1995) ("As in most instances when intent is an element of the crime charged, there was no direct evidence of the defendant's actual state of mind at the time of the assault. In such situations, intent may be proven circumstantially by inference from all the facts and circumstances developed at the trial. . .").

21. 411 U.S. 792 (1973).

22. 450 U.S. 248 (1981).

burden of establishing a "prima facie" case of discrimination. This is accomplished by proving that the complainant: i) is a member of a group protected by Title VII, ii) was qualified for the job in question, iii) was nonetheless rejected, demoted, or terminated, as the case may be, and iv) the employer continued to seek applicants with the complainant's qualifications, or in a case of demotion or termination, replaced complainant with someone of similar qualifications.²³ The Court has recently clarified the fourth requirement, holding that it is not necessary for the plaintiff to prove replacement by someone outside the protected class in order to establish a prima facie case.²⁴

The plaintiff's prima facie case functions to eliminate the most common reasons for rejection—that no position was available or that the applicant was not qualified for the position. The rejection of a qualified minority for an available position "raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors."²⁵ Writing for the Court in *Furnco*, Justice Rehnquist explained that

we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the adverse employment action] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based [its] decision on an impermissible consideration such as race.²⁶

The suspicion engendered by the prima facie case shifts a burden of production onto the employer to articulate a "legitimate, nondiscriminatory reason" for the adverse action.²⁷ If the employer fails to articulate such a reason, the court must enter judgment for the plaintiff "because no issue of

23. See *McDonnell Douglas*, 411 U.S., at 802-03. The *McDonnell Douglas* Court emphasized the flexibility of this formula: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [complainant] is not necessarily applicable in every respect to differing situations." *Id.* at 802 n.13.

24. See *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (fact that 56-year-old ADEA plaintiff was replaced by 40-year-old, who is also protected by ADEA, does not defeat prima facie showing).

25. *Burdine*, 450 U.S. at 254 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978))(emphasis added).

26. *Furnco*, 438 U.S. at 577.

27. *McDonnell Douglas*, 411 U.S. at 802. Despite Justice Powell's use of the term "legitimate," it is clear that the "factfinder may not focus on the soundness of the employer's business judgment, since [Title VII] was only intended to protect [plaintiff] from arbitrary classifications on the basis of [an impermissible criterion]. [Title VII] did not change the fact that an employer may make a subjective judgment to discharge an employee for any reason that is not discriminatory." *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986) (ADEA case). See also *Burdine*, 450 U.S. at 259 ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination."); *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979) (Title VII was not intended to "diminish traditional management prerogatives.").

fact remains in the case.”²⁸ If, however, the employer carries its burden, the case enters the “pretext” phase in which the plaintiff is afforded the opportunity to demonstrate that the stated explanation was not in fact the real reason for the decision. In the context of the *McDonnell Douglas* case, Justice Powell noted that while Title VII did not compel the company to employ Green despite his illegal protest activities, neither did it permit McDonnell Douglas to use Green’s conduct as a mere excuse for discrimination.²⁹

The employer’s burden of rebutting a prima facie case is merely to *articulate*, not prove, its non-discriminatory reason or reasons for the adverse employment decision. As the Court stressed in *Burdine*, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”³⁰ The Court observed, however, that “although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.”³¹

Describing the critical importance of the rebuttal phase, the Court explained:

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, *the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for plaintiff’s rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.* If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. *Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.* The sufficiency of the defendant’s evi-

Even an illegal reason suffices to rebut a prima facie case. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-13 (1993) (a motive to deprive plaintiff of his pension, while illegal under ERISA, may nonetheless be raised to rebut a charge of age discrimination under the ADEA). In a related context, the Court has recently held that a party’s explanation of a peremptory juror challenge is sufficient to meet its rebuttal burden even though it is “implausible,” “silly,” “fantastic,” or “superstitious.” *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995).

28. *Burdine*, 450 U.S. at 254.

29. See 411 U.S. at 804-05.

30. 450 U.S. at 253.

31. *Id.* at 258.

dence should be evaluated by the extent to which it fulfills these functions.³²

In order to serve its purpose, the employer's explanation "must be clear and reasonably specific"³³ because the *McDonnell Douglas* scheme is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."³⁴ "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel."³⁵ The employer's burden is to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."³⁶

Although the employer's articulation of non-discriminatory reasons rebuts the presumption raised by the prima facie case, the *Burdine* Court added this important caveat:

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.³⁷

Neither the plaintiff's initial burden of establishing a prima facie case nor the defendant's burden of rebuttal is an onerous task.³⁸ A case is highly unlikely to get to trial if the complainant cannot make the minimal showing necessary to raise an inference of discrimination and the employer cannot come up with a plausible defense for its action. The crux of an individual disparate treatment lawsuit is, therefore, the pretext stage—is the employer's explanation the *real reason* behind the challenged action, or merely a subterfuge?³⁹

An explanation can be pretextual in two senses—it can be false (e.g., the plaintiff was *not* excessively absent), or it can be selective in its application (e.g., the plaintiff *was* excessively absent, but so too were white em-

32. *Id.* at 254-56 (emphasis added).

33. *Id.* at 258.

34. *Id.* at 255 n.8.

35. *Id.* at 255 n.9.

36. *Id.* at 257.

37. *Id.* at 255 n.10.

38. *See id.* at 253.

39. A critic of the intent-based definition of discrimination complains that "the adjudication of most disparate treatment claims sinks inevitably into a thinly disguised brawl over whether the accused employer is lying about the reasons a particular decision was made." Krieger, *The Content of Our Categories*, *supra* note 15, at 1167.

ployees who were not similarly terminated).⁴⁰ Inquiry into the second form of pretext will focus on the comparative treatment of different groups for similar offenses, as well as on the employer's general practice with respect to equal opportunity.⁴¹

Describing the plaintiff's burden at the pretext stage, the Court has elaborated:

This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.⁴²

By presenting these two avenues of proof in the alternative, the Court clearly envisioned that a Title VII plaintiff lacking direct proof of discriminatory motivation could nonetheless prevail *solely* by discrediting the reasons articulated by the employer in response to the prima facie case. Proof that "a proffered explanation lacking a factual basis is a pretext" was equated with proof of "intentional discrimination."⁴³ This was the rule applied (with only muted disagreement) in the federal courts for two decades⁴⁴ until the decision in *St. Mary's Honor Center v. Hicks*.

III

UNRAVELING *MCDONNELL DOUGLAS*—*ST. MARY'S HONOR CENTER V. HICKS*

Melvin Hicks, an African-American, filed suit against his former employer, a halfway house operated by the Missouri Department of Corrections, alleging that his demotion and subsequent termination constituted discrimination because of race in violation of Title VII. United States District Judge Limbaugh, after a bench trial, found the following facts.⁴⁵

40. See *McDonnell Douglas*, 411 U.S. at 807. See also, e.g., *Padgett v. Litton Systems, Inc.*, 662 F. Supp. 106, 109 (S.D. Miss. 1987) (in the case of a discharge for violation of work rules, the plaintiff must demonstrate either that he did not violate the rule or that, if he did, white employees who similarly violated the rule were not punished similarly). In either case, pretext implies a determination that the reason has been manufactured by the employer as an excuse. See generally *Radovanic v. Centex Real Estate Corp.*, 767 F. Supp. 1322 (W.D.N.C. 1991), discussed *infra* notes 195-207.

As Justice O'Connor explains the dual meaning of pretext, "*McDonnell Douglas* and *Burdine* clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not 'the true reason' either because it *never* motivated the employer in its employment decisions or because it did not do so in a particular case." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (O'Connor, J., concurring) (1989).

41. See *McDonnell Douglas*, 411 U.S. at 804-05.

42. *Burdine*, 450 U.S. at 256 (emphasis added).

43. *Id.* at 258.

44. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 512-13 (1993) (collecting cases); Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L. REV. 57 (1991).

45. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244 (E.D. Mo. 1991).

Hicks was employed by St Mary's Honor Center from 1978 to 1984, hired initially as a correctional officer and promoted to shift commander in 1980. He was consistently rated as competent and satisfactory in the performance of his duties and was not disciplined or written up.

In January, 1984, a shakeup occurred at St. Mary's in which the top administrators, all African-Americans, were replaced with whites. Hicks was left as one of only two remaining African-Americans in supervisory positions. Twelve black employees (including Hicks) would be fired in the first year of the new regime, as compared to one white employee.⁴⁶ The personnel changes followed a 1981 study warning that "too many blacks were in positions of power" and that "blacks possessed too much power at St. Mary's."⁴⁷

Leading up to Hicks' discharge in June, 1984, were several incidents involving violations of institutional rules by officers working under his supervision. Although St. Mary's asserted at trial that these incidents, together with a heated argument with his supervisor, were the reason Hicks was demoted and ultimately fired, the District Court rejected this explanation as pretext. It found that "plaintiff was mysteriously the only person disciplined for violations actually committed by his subordinates;" that "plaintiff demonstrated [that the asserted policy of disciplining only shift commanders, not their subordinates] only applied to violations which occurred on plaintiff's shift;" that "much more serious violations, when committed by plaintiff's coworkers, were either disregarded or treated much more leniently;"⁴⁸ that "plaintiff was treated much more harshly than his coworkers who committed equally severe or more severe violations;" and finally that Hicks's superiors "had placed plaintiff on the express track to termination" and indeed "manufactured the confrontation between plaintiff and [his supervisor] in order to terminate plaintiff." The court concluded

46. During this period approximately the same number of blacks were hired as were terminated, so that twenty nine blacks were employed at St. Mary's at the end of 1984, as compared to thirty at the beginning of the year. See *id.* at 1249. The Eighth Circuit Court of Appeals noted in this regard:

The district court's findings do not, however, specify the levels of position at which these black individuals were hired and fired. Nor did the district court make relative comparisons of the treatment of blacks versus whites at specific positions. According to plaintiff, of the ten white employees who were on the custody roster at St. Mary's as of April 1984, five were promoted. Plaintiff additionally contends that the breakdown of blacks hired and fired demonstrates discrimination against blacks in *supervisory* positions.

Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 490 n.6 (8th Cir. 1992).

47. 756 F. Supp at 1249, 1252. Although recognizing that "heeding the warning of the Davis study would violate Title VII," *id.*, the District Court noted that none of the defendant's witnesses admitted he was aware of the study at the time of the 1984 personnel changes, *id.* at 1249, and the court so found. *Id.* at 1252.

48. *Id.* at 1250, 1251. For example, an inmate escaped during the shift of a white supervisor who admitted negligence in the incident. "Although the escape of an inmate is clearly much more serious than the [infractions committed by Hicks], [the white supervisor] was only given a letter of reprimand for the violation." *Id.* at 1251.

that plaintiff had "proven the existence of a crusade to terminate him."⁴⁹ Melvin Hicks was replaced by a white male.⁵⁰

Notwithstanding these findings the District Court entered judgment in favor of St. Mary's. The court determined that although "plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge," he "has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race."⁵¹ The court ruled that Hicks had not proven "that the crusade was racially rather than *personally* motivated."⁵² This was in the face of the facts that: 1) personal animosity was *never asserted* by St. Mary's as a possible explanation for the treatment of Hicks; 2) *no evidence* was offered by either party to suggest this explanation; and 3) the superior officer instrumental in Hicks' discharge *denied* on the witness stand that there were any personal difficulties between the two men.⁵³

In explaining his decision Judge Limbaugh pointed out that Hicks' black subordinates (who had actually committed the infractions he was ostensibly punished for) were not disciplined; that even though twelve blacks were terminated in 1984 as compared to only one white, they were replaced by other blacks; that the replacement of black supervisors by whites may have simply reflected the need to revamp a poorly run institution; and that the disciplinary boards that reviewed Hicks' violations included black members.⁵⁴

The Eighth Circuit Court of Appeals reversed and ordered judgment entered in favor of Hicks,⁵⁵ ruling that it was

improper for the district court to assume—without evidence to support the assumption—that defendants' actions were somehow "personally motivated." As the district court noted, defendants articulated only two legitimate, nondiscriminatory reasons for their actions (the severity and accumulation of violations), and both were discredited by plaintiff as pretextual. While we question whether such a hypothetical reason based upon *personal* motivation even could be stated and still be "legitimate" and "nondiscriminatory," we need not address that question because defendants simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim. In order to satisfy its burden at the second stage of the *McDonnell Douglas/Burdine* analysis, "the

49. *Id.* at 1252.

50. *See id.* at 1250.

51. *Id.* at 1252.

52. *Id.* (emphasis added).

53. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 542-43 (1993) (Souter, J., dissenting). Chief Powell testified: "I can't say that there was difficulties between [Hicks] and I. At no time was there any kind of personal" Brief for Respondent at 5, *Hicks* (No. 92-602) (citing Joint App. at 46).

54. 756 F. Supp. at 1252. The board convened to review Hicks' termination, however, voted only for a three-day suspension; it was overruled by the administration. *See id.* at 1247.

55. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487 (8th Cir. 1992).

defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."⁵⁶

The Eighth Circuit thus joined the majority of circuit courts⁵⁷ in holding that proof of pretext constitutes proof of discrimination:

Once plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position that if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.⁵⁸

The United States Supreme Court reversed.⁵⁹ Writing for the five-justice majority, Justice Scalia concluded that the rejection of the employer's non-discriminatory reason does *not* mandate a judgment for the plaintiff:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*." But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of [Federal Rule of Evidence] 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."⁶⁰

The Court held that plaintiff must prove *both* that the proffered reason was false, *and* that discrimination was the real reason.⁶¹ Disproving the employer's explanation becomes just "part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination."⁶² "Pretext," the Court emphasized, means "pretext for discrimination."⁶³ "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer. . . ."⁶⁴ "It is not enough, in other words, to *disbelieve*

56. *Id.* at 492 (citation omitted).

57. *See supra* note 44.

58. 970 F.2d at 492.

59. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

60. *Id.* at 511 (citations omitted).

61. *See id.* at 515.

62. *Id.* at 517.

63. *Id.* at 516.

64. *Id.* at 524.

the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."⁶⁵ Moreover, the plaintiff must disprove not only the reasons articulated by the employer, but "*all* other reasons suggested, no matter how vaguely, in the record."⁶⁶ Rejecting the argument that discrediting the employer's reasons should put the employer in the same position as if no rebuttal had been offered, the Court concluded that by "producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production" and, at that point, "the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."⁶⁷

Justice Souter, writing for the four dissenters, accused the majority of abandoning two decades of consistent precedent⁶⁸ (which Congress, though well aware of, took no action to indicate its disapproval)⁶⁹ in order to create a new scheme of proof which was both unfair and unworkable, a scheme that favors employers who had been found to have presented false evidence in court and disfavors the large majority of plaintiffs who are lacking direct evidence of discriminatory intent.⁷⁰

The dissent emphasized the dual function of the *prima facie* case in the *McDonnell Douglas* scheme—it raises an inference of discrimination and creates a mandatory presumption which the defendant must meet.⁷¹ The employer must either respond or lose. "[I]f the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, the plaintiff is entitled to judgment. . . ."⁷² Even if the employer meets the plaintiff's *prima facie* case, the evidence upon which it is based and the inferences drawn therefrom may be considered by the trier of fact on the issue of whether the employer's explanation is pretextual.⁷³ These inferences are "strengthened by showing, through use of further evidence, that the employer's articulated reasons are false, since common experience tells us that it is more likely than not that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff."⁷⁴

As the *prima facie* case "serves as a catalyst obligating the employer to step forward with an explanation for its actions,"⁷⁵ the employer's rebuttal, in turn,

65. *Id.* at 519.

66. *Id.* at 523.

67. *Id.* at 510.

68. *See id.* at 525 (dissenting opinion).

69. *See id.* at 542.

70. *See id.* at 533-34.

71. *See id.* at 528.

72. *Id.* (citation omitted).

73. *See id.* at 536.

74. *Id.* (internal quotations and citation omitted).

75. *Id.* at 529.

serves an important function neglected by the majority, in requiring the employer "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." The employer, in other words, has a "burden of production" that gives it the right to choose the scope of the factual issues to be resolved by the factfinder. But investing the employer with this choice has no point unless the scope it chooses binds the employer as well as the plaintiff. Nor does it make sense to tell the employer, as this Court has done, that its explanation of legitimate reasons "must be clear and reasonably specific," if the factfinder can rely on a reason not clearly articulated, or on one not articulated at all, to rule in favor of the employer.⁷⁶

"Once the employer chooses the battleground" at trial by articulating the reasons behind the challenged action and the factual inquiry proceeds to "a new level of specificity," *other* reasons cannot (as the majority held) simply be found "lurking in the record."⁷⁷ It makes no sense to permit the factfinder "to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove."⁷⁸ The dissenters would not "look beyond the employer's lie by assuming the possible existence of other reasons the employer might have proffered without lying." Further, in "telling the factfinder to keep digging in cases where the plaintiff's proof of pretext turns on showing the employer's reasons to be unworthy of credence, the majority rejects the very point of the *McDonnell Douglas* rule requiring the scope of the factual inquiry to be limited, albeit in a manner chosen by the employer."⁷⁹

The *McDonnell Douglas* construct, in short, requires the factfinder to choose which party's explanation of the events it believes, and for the dissenters this precludes "a third explanation, never offered by the employer."⁸⁰ Indeed, by holding that the pretext inquiry "is wide open, not limited at all by the scope of the employer's proffered explanation," the dissent argues that the Court has transformed the employer's burden of production "from a device used to provide notice and promote fairness into a misleading and potentially useless ritual."⁸¹ Melvin Hicks had "no opportunity to produce evidence showing that the District Court's hypothesized explanation, first articulated six months after trial, is unworthy of credence."⁸²

The Court's decision is thus portrayed as "unfair and utterly impractical" because it "saddle[s] the victims of discrimination with the burden of

76. *Id.* at 529-30 (citations omitted).

77. *Id.* at 530 & n.3.

78. *Id.* at 525.

79. *Id.* at 536-37.

80. *Id.* at 542.

81. *Id.* at 533-34.

82. *Id.* at 543.

either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision."⁸³ Justice Souter predicted that the decision would discourage the filing of meritorious cases, or seal their fate in court.⁸⁴

The remand to the District Court⁸⁵ would confirm this prediction. Plaintiff was permitted to take new depositions of the two administrators responsible for his discharge to explore the "now critical question of personal animosity."⁸⁶ Each testified unequivocally that they had felt no such hostility toward Hicks.⁸⁷ Rather, they continued to insist that the sole reason Hicks was terminated was because of the rule infractions, which Judge Limbaugh had already dismissed as pretext.⁸⁸ Notwithstanding this testimony, Limbaugh reaffirmed his previous finding that defendant's unfair treatment of plaintiff was motivated by personal animosity, which was not itself motivated by race, and he again entered judgment for the defendants.⁸⁹

83. *Id.* at 528.

84. *See id.* at 537-38.

85. *Hicks v. St. Mary's Honor Ctr.*, No. 88-109C(5) (E.D. Mo. Aug. 31, 1995), *described in* 90 F.3d 285 (8th Cir. 1996).

86. 90 F.3d at 289.

87. *See id.* at 290 n.6. Superintendent Long testified in his deposition as follows:

Q. Did you have any personal animosity towards Mr. Hicks?

A. No, sir.

Q. Was there any reason other than his alleged violation of rules that caused you to make a recommendation for his termination?

A. No, sir.

Joint App., Vol. II at 121-22 (deposition of Steve Long), *Hicks* (No. 92-602).

Chief Powell testified in his deposition as follows:

Q. Okay. Just directing your attention to then Mr. Hicks, did you have any personal problems with him of any nature?

A. Personal, no.

...

Q. Okay. Now, what I'm trying to find out, Mr. Powell, the court has made certain findings that you and Mr. Long put him on an express track for dismissal. And I'm trying to find out if there was any reason other than your feeling that he had violated some rules for your actions.

A. No, sir. I just reported the activities.

Q. You just reported on his activities?

A. Yes, sir.

Q. So you had no personal animosity?

A. No, sir. None whatsoever.

Joint App., Vol. II at 146, 147 (deposition of John Powell). 90 F.3d at 290 n.6.

88. *See id.* at 290.

89. *See id.* The district court also ruled against Hicks on his separate retaliation claim, which had not been addressed in the first decision. Despite finding that Hicks's termination occurred only four days after the Department of Corrections received notice of a second complaint filed by Hicks with the EEOC challenging the initial disciplinary action against him, Judge Limbaugh rejected the claim by determining "that there was a lack of racial motivation in the decision to demote and discharge the plaintiff as retaliation for his filing complaints with the Equal Employment Opportunity Commission." *Id.* at 290 (emphasis added).

On appeal to the Eighth Circuit,⁹⁰ defendants' counsel abandoned reliance on the discredited rule violations explanation and "astutely embraced"⁹¹ personal animosity as the sole justification for the actions taken against Hicks. The court, on review for clear error of the District Court's finding that racial discrimination did not motivate Hicks' discharge, affirmed.

IV

A CRITIQUE OF *ST. MARY'S HONOR CENTER V. HICKS*

Hicks has substantially altered the landscape for the litigation of disparate treatment cases, both by reducing the *McDonnell Douglas* structure to "nothing but an empty ritual"⁹² and by opening a wide "personality clash" loophole. The decision, as well as its underlying conceptualization of the discrimination phenomenon, threaten the very viability of Title VII, as the following sections demonstrate.

A. *The Probative Force of Proving Pretext*

The majority opinion in *Hicks* distills down to disconnecting pretext from pretext *for discrimination*. Justice Scalia's truism that not every cover-up is designed to hide discriminatory motivation, however, takes the discussion out of its legal, historical, and factual context. When returned to that context, the *Hicks* decision simply does not stand up.

In the *McDonnell Douglas/Burdine* framework, pretext is equated with pretext for discrimination precisely because the nature of the proof both preceding and supporting a finding of pretext leads to the sensible conclu-

The Eighth Circuit determined that the district court misconstrued the settled law in assuming that there must be a racial motivation before retaliation against an employee for filing an EEOC complaint is actionable under 42 U.S.C. § 2000e-3(a). Nonetheless, it ruled that the plaintiff had not properly raised this issue on appeal, and thus refused to reverse. See *id.* at 292.

The circuit court recognized that Limbaugh in the above-quoted language did find that "the decision to demote and discharge plaintiff [was in] retaliation for his filing complaints with the Equal Employment Opportunity Commission." *Id.* at 291. This would satisfy Hicks' burden on that claim. The court avoided this result by noting that in his ultimate conclusion Limbaugh found no retaliation. See *id.* at 293.

90. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285 (8th Cir. 1996).

91. *Id.* at 290. The court's characterization is perplexing given the fact that "one circumstance that will usually justify a finding of pretext is a change in the employer's explanation for the challenged action between the action and trial." JOEL W. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 118-19 (3d ed. 1993). Even more perplexing is how the District Court and Eighth Circuit could find that the motivating reason was personal animosity when the decision-makers themselves (probably against their own interest) categorically denied this. Compare *Tye v. Board of Educ.*, 811 F.2d 315, 319 (6th Cir. 1987), cert. denied 484 U.S. 924 (1987) (relying on the testimony of the individual "whose state of mind is at issue here.").

92. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2237 (1995). Professor Malamud's solution is to abandon the structure entirely and substitute "the kind of holistic factfinding that is most likely to reveal the truth about discrimination in the workplace." *Id.*

sion that the hidden motivation was discrimination. Rejection of the explanation offered by the employer occurs after the plaintiff has already established a prima facie case raising suspicion of a discriminatory basis for the adverse action,⁹³ and after the employer has made its best effort to dispel that suspicion. A conclusion of discriminatory motive thus logically "follows from the determination that the given reason for the termination was a pretext."⁹⁴

It must be remembered that the plaintiff's burden of proof in a civil action is mere preponderance of the evidence.⁹⁵ "That is, the jury does not have to be certain or even reasonably certain; it need only conclude that it is more likely than not that [the prohibited criterion] motivated the employer's decision."⁹⁶ Is discrimination "the best explanation for a particular course of conduct?"⁹⁷ As William Twining has put it, "[i]n litigation, the issue is not 'Is it certain?', but 'Does it conform to the best available judgment that can be reached based upon the evidence provided in light of the stock of knowledge and beliefs commonly held in the particular society at the time

93. Even after the employer rebuts the plaintiff's prima facie case, the "evidence previously introduced by the plaintiff to establish a prima facie case" and the "inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the [employer's] explanation is pretextual." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

94. *Talbert Trading Co. v. Massachusetts Comm'n Against Discrimination*, 636 N.E.2d 1351, 1356 (Mass. App. Ct. 1994). In *Blare v. Husky Injection Molding Sys.*, 646 N.E.2d 111 (Mass. 1995), the Supreme Judicial Court rejected the *Hicks* analysis, concluding that the "pretext only" position is "better policy." *Id.* at 117. "Combined with establishment of a prima facie case by a preponderance of the evidence, a showing of pretext eliminates any legitimate explanation for the adverse hiring decision and warrants a determination that the plaintiff was the victim of unlawful discrimination. The plaintiff need not conclusively exclude all other possible explanations for the decision and prove intent beyond a reasonable doubt." *Id.*

95. See MCCORMICK ON EVIDENCE § 339, at 574-75 (John William Strong ed., 4th ed. 1992).

96. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 106 (3d ed. 1994). See also 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL § 72.01 (4th ed. 1987) ("a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.").

Thus the observation that discrimination is "by no means *certain*" where unexplained adverse action is taken against a member of a protected group, see *Malamud*, *supra* note 92, at 2254, is inapposite. That kind of *certainly* is not the standard even in criminal cases, which must be proven beyond a *reasonable* doubt.

The three types of burdens of persuasion (preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt) have been compared as follows: a) what *probably* happened; b) what *highly probably* happened; and c) what *almost certainly* happened. See J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242, 247 (1944).

97. ZIMMER, *supra* note 96, at 106.

the case is tried?"⁹⁸ The "so-called trier of fact," Roger Traynor reminds us, "is really a trier of probabilities."⁹⁹

Once the employee has discredited the reasons articulated by the employer in response to the *prima facie* case, it is hard to avoid the conclusion that it is more likely than not that the employer is concealing conduct unlawful under Title VII. While it is of course *possible* that the employer has provided a false explanation to cover some *other* illegality or embarrassment, that possibility is by definition speculative, because the employer has not offered evidence of it. The factfinder is free to draw *reasonable inferences* from the evidence;¹⁰⁰ but to permit the factfinder to engage in speculation and conjecture about hidden explanations would end any semblance of rationality in the litigation process. The procedural devices of directed verdict and judgment notwithstanding the verdict ("JNOV"),¹⁰¹ as well as the authority of the federal judge to comment on and express an opinion concerning the weight of the evidence,¹⁰² are designed to prevent just such distortions of the litigation process.

In explaining the probative force of circumstantial proof (which is now universally recognized as of equal and sometimes greater weight than "direct" proof¹⁰³), Wigmore wrote: "When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability"¹⁰⁴ So too with the fact of pretext in the context of *Mc-*

98. ANDERSON & TWINING, *supra* note 19, at 69. "Certainty, absolute certainty, is a satisfaction which on every ground of inquiry we are continually grasping at, but which the inexorable nature of things has placed forever out of reach. Practical certainty, a degree of assurance sufficient for practice, is a blessing, the attainment of which, as often as it lies in our way to attain it, may be sufficient to console us under the want of any such superfluous and unattainable acquisitions." 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 351 (J. S. Mill ed., 1827).

99. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 29 (1970).

100. See DEVITT, *supra* note 96, at § 73.04.

101. See generally MCCORMICK, *supra* note 95, at §§ 336-339.

102. See Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 Nw. U. L. REV. 892, 902-04 (1982) [hereinafter Allen, *Presumptions, Inferences and Burden of Proof*].

103. See generally 1A WIGMORE ON EVIDENCE § 26 (1983 Tillers rev.) ("So far as logic and psychology assist us, their conclusions show that it is out of the question to make a general assertion ascribing greater weight to one class [of evidence] or to the other. The probative effect of one or more pieces of either sort of evidence depends upon considerations too complex. Science can only point out that each class has its special dangers and its special advantages."); DEVITT, *supra* note 96, at § 72.03. "As in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. . . . [Title VII] does not require direct proof of discrimination." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (citations and internal quotes omitted). See also *Kimberlin v. Quinlan*, 6 F.3d 789, 808 (D.C. Cir. 1993) (Edwards, J., dissenting), *vacated and remanded on other grounds* 115 S. Ct. 2552 (1995).

104. 1A WIGMORE ON EVIDENCE, *supra* note 103, § 32, at 992.

Donnell Douglas/Burdine. Justice Powell recognized for a unanimous Court in both of these cases that the circumstantial evidence in this context is, as has been described in similar situations, so "irresistibly convincing" that the factfinder "should not be left to refuse to draw the only rational inference."¹⁰⁵

The *McDonnell Douglas/Burdine* framework is based on well-established concepts of circumstantial proof, inference, and logic, including the use of common sense generalizations derived from observation.¹⁰⁶ The *prima facie* case is a form of eliminative induction, which Justice Rehnquist observed reflects our "common experience as it bears on the critical question of discrimination."¹⁰⁷ When the obvious reasons for rejecting a minority or female candidate have been eliminated, we suspect discrimination and require an explanation.¹⁰⁸

The concept of pretext similarly reflects our experience with evasive explanations offered by those accused of wrongdoing, such as the frequent use of "consciousness of guilt" evidence in criminal cases and "consciousness of liability" evidence in civil cases.¹⁰⁹ "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating

105. MCCORMICK ON EVIDENCE, *supra* note 95, § 338, at 573. In such a situation, the jury should be instructed that if it determines that the employer's reasons are not the real reasons for the action, it must find discrimination, the only other explanation on the evidence. *See id.* at 574.

106. For a discussion of the variety of such generalizations, see ANDERSON & TWINING, *supra* note 19, at 368-69; DAVID A. SCHUM, THE EVIDENTIAL FOUNDATIONS OF PROBABILISTIC REASONING 24-30 (1994).

107. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Thayer would describe the *prima facie* case as an application of "the ordinary rules of human thought and human experience, to be sought in the ordinary sources, and not in law books." JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 274-75 (1898). As Professor Imwinkelried has written in another context,

We commonly accept the trier's knowledge of 'the ways of the world' as a trustworthy basis for legal reasoning. That knowledge is one of the bases for the *res ipsa loquitur* doctrine; and the jury instructions in many jurisdictions specifically encourage jurors to employ that knowledge as a basis for resolving factual disputes.

Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea*, 51 OHIO ST. L.J. 575, 588 (1990).

Juries are typically instructed that in drawing inferences from the evidence, they may use their general knowledge and common sense. *See, e.g., Com. v. Henry*, 640 N.E.2d 503, 509 (Mass. App. Ct. 1994).

108. *Furnco*, 438 U.S. at 577. Indeed, Justice Powell defined the *prima facie* case as one in which the plaintiff demonstrates that "she was rejected *under circumstances which give rise to an inference of unlawful discrimination*." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added). *See also O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) (*prima facie* case requires "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion"); *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1556 n.12 (11th Cir. 1995) ("Whether a *prima facie* case has been established is a fact specific inquiry: Would an ordinary person reasonably infer discrimination if the facts presented remained un rebutted?").

109. *See generally* PAUL J. LIACOS ET AL., HANDBOOK OF MASSACHUSETTS EVIDENCE 120-27 (6th ed. 1994). Evidence of concealment is routinely considered probative of the defendant's guilty state of mind, and while standing alone is deemed insufficient to support a conviction, evidence of such a state of mind when coupled with other probable inferences may be sufficient to convict.

consciousness of guilt, which is, of course, evidence of illegal conduct."¹¹⁰ "Common experience tells us that it is more likely than not that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff."¹¹¹ An employer may explain away the proffer of a pretextual reason to the employee (such as the desire to avoid confrontation, or to protect a business secret or another employee), but absent such an explanation, the inference of discrimination is powerful. When the false reason is presented as a defense in court, the inference is overwhelming.¹¹²

The combined probative force of both the *prima facie* case and the pretextual response creates an irrefutable inference of discriminatory motivation.¹¹³ As Judge Torres has put it, "if the employee demonstrates that the proffered reason is pretextual, the *prima facie* case is reinstated and its inference of a discriminatory purpose may be considered along with any

110. *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995).

111. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 536 (1993) (Souter, J., dissenting) (internal quotations omitted).

112. Judge DeMoss has argued to the contrary:

Although candor in employment relationships is a laudatory goal, it is clear that nothing in the ADEA statute says that an employer will be liable if he does not tell his employee the real reason for his discharge. The fundamental premise underlying the permissive inference allowed by [McDonnell Douglas] is that if the employer lies about its reasons for discharging an employee, an inference may be drawn that he did so in order to cover up the real reason: unlawful and intentional discrimination

Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1005 (5th Cir. 1996) (concurring in part & dissenting in part).

This view appears to overlook the salient fact that under the *McDonnell Douglas* scheme the presentation of a false reason has occurred *in court*, presumably after due consultation with counsel and consideration of the consequences. Whatever alternative explanation there may be for lying to the employee *outside* of court, the presentation of a false explanation *in court* (together with the circumstances underlying the *prima facie* case) points markedly in one direction—an attempt to hide discrimination.

It may be argued that in a shop where, pursuant to the collective bargaining agreement or otherwise, discharges may only be for "good cause," a supervisor would have an incentive to deny (both in and out of court) that "personal animosity" was the basis for a discharge. The fact remains, however, that defense counsel's responsibilities require a thorough investigation of the circumstances of the discharge; and if that investigation reveals that the real reason for the action, while non-discriminatory, was otherwise wrongful, counsel must consider the ethical as well as strategic consequences of proffering a false reason in court. Where the defendant is caught between admitting one of two unlawful acts, the law should impose on defendant the burden of making that choice.

113. Wigmore uses the following illustration of the enhanced power of such an inference:

The fact that A left the city soon after a crime was committed will raise a slight probability that he left because of his consciousness of guilt, but a greater one if his knowledge that he was suspected be first shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations; but the addition of the fact that A knew of the charge tends to put these other inferences into the background, and makes the desired explanation or conclusion—*i.e.* a guilty consciousness—stand out prominently as a more probable and plausible one. Even then there are other possible inferences—such as a summons from a dying relative or the fear of a yellow-fever epidemic in the city; but these are not the immediately natural ones, and the greater naturalness of the desired explanation makes it highly probable.

JOHN HENRY WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 12, at 25-26 (3d ed. 1937) [hereinafter WIGMORE, *THE SCIENCE OF JUDICIAL PROOF*].

contrary evidence in determining whether the employer was motivated by an intent to discriminate. Otherwise, the employer's mere articulation of a patently specious nondiscriminatory reason, even if transparently disingenuous, would return the employee to the untenable position of having to prove discriminatory intent only by 'smoking gun' evidence. . . ."¹¹⁴

Thus contrary to the assertion of one writer that *McDonnell Douglas* constitutes "a kind of affirmative action" and "special rules" designed to tip the scales in favor of plaintiffs,¹¹⁵ the structure represents a sensible allocation of burdens necessitated by the realities of proving state of mind.¹¹⁶ Indeed, the very same logic underlies the Court's most recent treatment of the legislative redistricting cases. *Shaw v. Reno*¹¹⁷ and *Miller v. Johnson*,¹¹⁸ for example, involved claims by white voters that congressional dis-

114. *Connell v. Bank of Boston*, 924 F.2d 1169, 1181 (1st Cir. 1991) (concurring opinion).

115. See Malamud, *supra* note 92, at 2237. Professor Malamud argues that "the Supreme Court never succeeded in setting the prima facie case threshold high enough to permit the proven prima facie case to support a sufficiently strong inference of discrimination to mandate judgment for the plaintiff when combined only with disbelief of the employer's stated justification." *Id.* at 2236-37.

Recent experience with the problem of racially-motivated peremptory challenges teaches, however, that proof of pretext is itself a difficult task at best, and should inform the decision as to whether to compound that difficulty by requiring (as *Hicks* seems to suggest) affirmative proof of the reason behind the cover-up. The Court has adopted a *McDonnell Douglas* structure for the resolution of cases raising objections based on *Batson v. Kentucky*, 476 U.S. 79 (1986), which forbids the use of racially motivated challenges to potential jurors. See *Purkett v. Elem*, 115 S. Ct. 1769, 1770-71 (1995). The prohibition was extended to civil cases in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and to gender-based challenges in *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

"Ten frustrating years" of experience with *Batson* has led United States District Judge Constance Baker Motley to conclude that the difficulty of disproving the reasons offered by the proponent of the strike precludes an accurate assessment of whether racial motivation underlies the action. See *Minetos v. City Univ. of New York*, 925 F. Supp. 177, 183 (S.D.N.Y. 1996). Courts are left to "guess at what facially race-neutral reasons are, in fact, pretextual for discriminatory motives." *Id.* The *Batson* test "does not truly unmask racial discrimination. In short, lawyers can easily generate facially neutral reasons for striking jurors and trial courts are hard-pressed to second-guess them, rendering *Batson* and *Purkett*'s protections illusory." *Id.* at 185. She thus advocates the total banning of peremptory challenges, invoking Justice Marshall's prophecy that the *Batson* test would leave lawyers "free to discriminate . . . in jury selection provided that they hold discrimination to an 'acceptable' level." 476 U.S. at 105 (Marshall, J., concurring).

In guidelines drawn up by the New York Appellate Courts to assist trial judges in determining the merits of *Batson* challenges, certain reasons offered as explanation for a juror strike are presumed pretextual on their face. See *Minetos*, 925 F. Supp. at 184 (citation omitted). These reasons include the juror's employment, neighborhood, or clothing. Other reasons are presumed non-pretextual, such as the juror's criminal record or past dealings with police. "Of course", Judge Motley observes, "listing in this manner has the unfortunate effect of creating a how-to guide for defeating *Batson* challenges. Such guidelines do not ensure that juror strikes are not racially motivated—only that advocates are on notice of which reasons will best survive judicial review." *Id.* at 184-85.

116. As Professor Calloway observes, "in a world in which most people are smart enough to avoid providing direct evidence of discriminatory intent, it is critical for the law to define a prima facie case which creates a presumption of discrimination absent evidence to the contrary." Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1037 (1994).

117. 509 U.S. 630 (1993). *Shaw* was decided three days after *Hicks*.

118. 115 S. Ct. 2475 (1995). *Shaw* and *Miller* relied on a long line of cases in which racial purpose is presumed from otherwise unexplainable government action. See *Miller*, 115 S. Ct. at 2487.

tricts were unlawfully shaped to maximize black voter power. The Court held that the creation of a district that is so geographically bizarre as to be unexplainable on grounds other than race gives rise to the conclusion that it was a racial gerrymander in violation of the Equal Protection Clause.¹¹⁹

Requiring plaintiffs to go beyond both establishing the *prima facie* case and discrediting the employer's rebuttal "unjustifiably multiplies the plaintiff's burden" and defies common sense in discounting the importance of "an employer's submission of a discredited explanation for firing a member of a protected class."¹²⁰ The result is that only plaintiffs with cases of patently obvious or egregious discrimination will prevail.¹²¹

The distinction *Hicks* draws between pretext and pretext for discrimination fundamentally misconstrues what a showing of pretext usually involves. A plaintiff proves pretext by demonstrating, among other things, disparate treatment of persons similarly situated except for race, gender, etc. Plaintiff *Hicks* accomplished much more at trial than simply discrediting his employer's assertion that he was terminated because of work rule violations. He was the only remaining black supervisor once his three black

119. The *Miller* Court observed that "we fail to see how the District Court could have reached any conclusion other than that race was the predominant factor in drawing Georgia's Eleventh District." 115 S. Ct. at 2489. A similar observation could have been made three days earlier regarding the clear predominance of race in the decision to terminate Melvin Hicks.

In *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) [hereinafter *Shaw II*], the Court reversed the lower court's ruling on remand that had upheld the districting plan and held that it constituted impermissible racial gerrymandering. It is interesting to note that in this "reverse discrimination" context, Chief Justice Rehnquist's opinion for the Court reflects none of the constraints that were placed on circumstantial proof in *Hicks*. Rather, Rehnquist emphasizes that plaintiffs may prove their case *either* through "circumstantial evidence of a district's shape and demographics or through more direct evidence going to legislative purpose." 116 S. Ct. at 1900 (citation and internal quotations omitted). And in dramatic contrast with *Hicks*, the Court precludes speculation about motive that goes beyond the defendant's evidence:

Justice Stevens [in dissent] discerns three reasons which he believes "may have motivated" the legislators to favor the creation of the two minority districts and which he believes together amount to a compelling state interest. As we explain below, *a racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislators*. To be a compelling interest, the State must show that the alleged objective was the legislature's actual purpose "for the discriminatory classification"

Id. at 1902 (emphasis added). There was of course no similar rejection of speculation about the possible non-racial motives of St. Mary's Honor Center.

The majority's position in *Shaw II* led Justice Stevens to observe:

There is no small irony in the fact that the Court's decision to intrude into the State's districting process comes in response to a lawsuit brought on behalf of white voters who have suffered no history of exclusion from North Carolina's political process, and whose only claims of harm are at best rooted in speculation and stereotypical assumptions about the kind of representation they are likely to receive from the candidates that their neighbors have chosen.

Id. at 1922 (dissenting opinion).

120. *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1059 (8th Cir. 1988).

121. See, e.g., *Barber v. CSX Distribution Serv.*, 68 F.3d 694 (3d Cir. 1995) (ADEA plaintiff not only discredited employer's explanation but also proved that supervisor created false interview reports and backdated report for candidate selected).

colleagues had been replaced by whites. There was apparently a deliberate effort to change the racial makeup of the staff after a study had concluded that there were too many blacks in positions of power at St. Mary's. Hicks was "mysteriously" (the district court's characterization) the *only* person disciplined for violations committed by subordinates. More serious violations committed by white co-workers were routinely overlooked. Hicks's white supervisor "manufactured" the physical confrontation in order to provoke Hicks and to justify his termination. The white administrators had placed Hicks "on the express track to termination."¹²²

In light of all this, the conclusion that plaintiff had proven pretext but not pretext for *discrimination* is both startling and irrational.¹²³ Speculation that the "crusade to terminate" Hicks may have been personally and not racially motivated can only be described as bizarre, especially given the testimony of Hicks' supervisor categorically denying any personal animosity.¹²⁴ The *Hicks* case is Exhibit 1 for the proposition that proof of pretext typically constitutes proof of discrimination.

It is well settled that proving pretext requires more than just a demonstration that the employer's judgment was wrong or mistaken. As one court has explained:

The Plaintiff cannot prove that the employer's reason for his discharge was pretextual merely by claiming that the employer's action was mistaken. The law is clear that an employer's reason for his action may be a good reason, a bad reason, a mistaken reason, or no reason at all, as long as the decision was not based on race and/or sex or other unlawful discriminatory

122. *Hicks*, 756 F. Supp. 1244, 1251. In light of the report implicitly suggesting a redress of the perceived imbalance in favor of black supervisors, the crusade to get rid of Hicks was predictable. Rational bias theory teaches that managers and supervisors are (independent of personal prejudice or group identification) more likely to engage in discrimination where they believe they will be rewarded for it by their superiors. See Laurie Larwood et al., *Sex and Race Discrimination Resulting from Manager-Client Relationships: Applying the Rational Bias Theory of Managerial Discrimination*, 18 SEX ROLES 9 (1988).

123. Scalia's skepticism about circumstantial proof of discrimination dates back at least a decade before *Hicks*. In a dissenting opinion written while he sat on the D.C. Circuit Court, he took the position that evidence of differential treatment does not constitute evidence of racial motivation. See *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984) (Scalia, J., dissenting). Foreshadowing *Hicks*, Scalia asserted that evidence that Carter, the only black employee of the company, had been treated differently than white employees in numerous regards was "not circumstantial evidence of racial motivation, but only . . . of an intent to disfavor Carter. That is not against the law." *Id.* at 1246.

The Court responded to what it described as Scalia's "novel theory": "The dissent, not content with limiting the use of circumstantial evidence, apparently would have us go so far as to require direct evidence of discriminatory animus. . . . An imposition of a direct evidence requirement is without precedent, and, in this time of sophisticated employers would effectively eviscerate [anti-discrimination statutes]." *Id.* at 1231-32.

124. Disbelief of evidence is generally not sufficient to establish the contrary proposition. See *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952) (Hand, J.); *LIACOS*, *supra* note 109, § 4.2.3, at 130. See also *Hopping v. Whirlaway, Inc.*, 637 N.E.2d 866, 869 (Mass. App. Ct. 1994) ("There is affirmative evidence from the bartender that she did not serve Regan during the last stop at the Whirlaway. The jury were not required to believe the bartender's testimony, but their disbelief does not establish the opposite, viz., that Regan was served the second time around.").

criteria. An employer is not required to prove that its decision was correct; the trier of fact need only determine that the defendant, in good faith believed the plaintiff's performance to be unsatisfactory and that the asserted reason for the action was not a mere pretext for discrimination.¹²⁵

A finding of pretext means that the employer "did not give an honest account of its behavior."¹²⁶ It requires proof that the employer knew the proffered reasons to be false,¹²⁷ or actually "manufactured" them.¹²⁸ Because such a finding is usually based on evidence of differential treatment,¹²⁹ the dichotomy between pretext and pretext for discrimination collapses.

Hicks of course challenges only the *mandatory* nature of the inference of discrimination from a finding of pretext, holding that the inference should be merely permissive and that the factfinder should have leeway to conclude that the hidden explanation is something other than discrimination. The majority concludes that Rule 301 of the Federal Rules of Evi-

125. *Radovanic v. Centex Real Estate Corp.*, 767 F. Supp. 1322, 1334 (W.D.N.C. 1991) (citation omitted). See generally *FRIEDMAN & STRICKLER*, *supra* note 91, at 118-19. See also *Keller v. Orix Credit Alliance, Inc.*, 73 Fair Empl. Prac. Cas. (BNA) 72 (3d Cir. 1997); *Hill v. Mississippi State Employment Serv.*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) (agency's bureaucratic inefficiency and ineptitude was a proper defense to a Title VII action as long as it is race-neutral); *Wheelock College v. Massachusetts Comm'n Against Discrimination*, 355 N.E.2d 309, 314 (Mass. 1976) (state anti-discrimination statute "does not protect against all instances of arbitrary action or from poor managerial judgment.").

126. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1564 (11th Cir. 1995) (Johnson, J., concurring).

127. See *id.*

128. See *Radovanic*, 767 F. Supp. at 1334.

129. See, e.g., *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995) (jury might have found that the placing of the younger staff assistant in a lower level position was inconsistent with the articulated policy, and thus properly found the explanation to be pretextual); *Blare v. Husky Injection Molding Sys.*, 646 N.E.2d 111, 118 (Mass. 1995) (evidence that other workers not in protected age category who committed similar errors were not terminated established pretext). Cf. *Belliard v. Banco Bamerindus do Brasil S.A.*, 1996 WL 509742, *6 (S.D.N.Y. Sept. 6, 1996) (no evidence of pretext where females have been terminated for reasons similar to those asserted against male plaintiff).

dence¹³⁰ would preclude a mandatory inference even if one were deemed logically appropriate.¹³¹

Federal Rule of Evidence ("FRE") 301 does not, however, appear to be implicated at the pretext stage of the litigation. The only true presumption raised in the *McDonnell Douglas* sequence results from the establishment of a prima facie case, which shifts the burden of production to the defendant in conformity with FRE 301.¹³² A plaintiff who has proven pretext has, by definition, already met its burden of persuasion in discrediting the employer's nondiscriminatory explanation. The *McDonnell Douglas* treatment of pretext does not shift the burden of persuasion to the defendant. Rather, it recognizes that a plaintiff who has discredited the defendant's alternative explanation is entitled to a finding of discrimination because: 1) rationally that is the *only* other explanation on the table, and 2) as a matter of social policy, enforcement of Title VII (which has been left for the most part in private hands) requires such a rule.¹³³

130. FRE 301 states:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FRE 301 is viewed as adopting the "bursting bubble" theory advocated by Thayer, in which the only effect of a presumption is to shift the burden of producing evidence regarding the presumed fact; if that evidence is produced, the presumption disappears (although the facts which gave rise to the presumption frequently raise a natural inference of the presumed fact and may thus get the case to the jury). MCCORMICK ON EVIDENCE, *supra* note 95, § 344.

Critics (most notably Morgan) have long argued that this conception undermines the important policy reasons that justify many presumptions. Presumptions, to be effective, must shift the burden of persuasion in this view. *See id.* The original proposed FRE 301 took this position. *See Rules of Evidence for United States Courts and Magistrates, Proposed Rule 301, 56 F.R.D. 183, 208 (1972).* Congress rejected that version.

Others have concluded that "any effort to dictate the effect of presumptions in civil cases by a single, generic evidence rule is doomed to failure because of the difficulties inherent in reducing to rule form the myriad factors that properly should influence the effect of a common law presumption." D. Craig Lewis, *Should the Bubble Always Burst? The Need for a Different Treatment of Presumptions Under IRE 301*, 32 IDAHO L. REV. 5, 7 (1995). *See also* MCCORMICK ON EVIDENCE, *supra* note 95, § 345, at 589; Allen, *Presumptions, Inferences and Burden of Proof*, *supra* note 102, at 892; Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981) [hereinafter Allen, *Presumptions Reconsidered*] (term "presumption" should be abandoned in favor of direct allocation of the burdens of proof based on "general principles derived in light of reason and experience.").

131. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

132. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 n.8 (1981). As one court has put it, "*Hicks* clarified that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief." *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

133. Professor Malamud characterizes this as a "conclusive presumption" which is actually a "rule of substantive law that courts remain free to adopt notwithstanding Rule 301." Malamud, *supra* note 92, at 2262 n.110. Malamud concedes that courts

The issue is not, therefore, the mandatory or permissive nature of any presumption but, more fundamentally, whether the factfinder can be permitted (as a matter of procedure as well as policy) to reject *both* parties' scenarios and paint one of its own. As Justice Souter posed it: "The question presented in [*Hicks*] is not whether the mandatory presumption is resurrected [once the employer's articulated reason is rejected] (everyone agrees that it is not), but whether the factual enquiry is narrowed by the *McDonnell Douglas* framework to the question of pretext."¹³⁴ Put another way, can we permit the employer to prevail when the reason it offers to rebut the presumption of discrimination is rejected by the factfinder who, then, substitutes an *unarticulated* reason as the true explanation? It is to this question we turn next.

B. Distortion of the Adversary Process

St. Mary's Honor Center v. Hicks permits the fact-finder to reject *both* the employer's defense and the plaintiff's proof of discriminatory motive, then to substitute an entirely different scenario that absolves the defendant of liability.¹³⁵ The Court thus abandons not only the *McDonnell Douglas/Burdine* framework, but two of the most basic tenets of American procedure as well—first, that the court is a passive tribunal, not an active player

routinely take into account the policy concerns animating a body of substantive law when deciding sufficiency-of-the-evidence questions, both on the level of the individual case and the making of proof rules to govern categories of cases. Thus, if the *McDonnell Douglas-Burdine* proof structure expresses the Court's policy judgment to look the other way when faced with the insufficiency of the "combined evidence," there would be good reason to adopt the "judgment for plaintiff required" position.

Id. at 2262-63 (citations omitted).

As Professor Allen puts it, the "federal courts . . . exercise the power to allocate burdens and levels of persuasion consistent with perceived demands of policy if a federal statute does not control. The exercise of this power poses no serious problems as long as its justification is clearly stated so as to ensure consistency." Allen, *Presumptions, Inferences, and Burden of Proof*, *supra* note 102, at 900. Allen discusses *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), which shifts the burden to defendant in wrongful termination case once plaintiff proves that conduct in question was constitutionally protected. *See id.* at 899. FRE 301, Professor Allen points out, does not purport to limit the federal courts' power to allocate burdens of persuasion, but only the ability to do so through presumptions. *See id.* at 904-05.

For further discussion of the role of social policy in the formulation of rules of proof, see McCORMICK ON EVIDENCE, *supra* note 95, §§ 343-44.

134. *Hicks*, 509 U.S. 502, 529 n.2 (dissenting opinion).

135. Professor Malamud poses the issue in its broadest form—"Is the factfinder ever permitted to interpret the evidence in a way that leads it to reject *both* parties' preferred theories of the events?"—and invokes the "new evidence scholarship" surrounding that question. *See* Malamud, *supra* note 92, at 2273 & n.146. The issue raised by *Hicks*, however, is much narrower: Can the factfinder reject *both* parties' theories after the establishment of a *prima facie* case and the discrediting of the reasons articulated in rebuttal, particularly in the absence of evidence supporting the alternative theory?

The observation of Professors Twining and Anderson that "[t]he unexamined possibility first seen and raised at trial is ordinarily a sign of desperation or inadequate preparation," ANDERSON & TWINING, *supra* note 19, at 85, is even more compelling when it is the judge who raises the defense at (or in the *Hicks* case *after*) trial.

in the construction of arguments or theories;¹³⁶ and second, that cases are to be decided solely on the basis of the evidence presented, not the conjecture of the factfinder.¹³⁷ Fact finders, it must be remembered, are “not asked to evaluate the true probability of the plaintiff’s case” but rather to decide “*on the basis of the evidence* in the case whether the plaintiff’s case is more likely than not . . . to be true.”¹³⁸

Moreover, the majority position in *Hicks* suspends the adversary process itself, the familiar dialectic between opposing sides. As Wigmore described it, the proponent offers evidence which usually leaves at least one inference open that is counter to the one desired; that dictates a “specific course” for opposing counsel: to “show, by adducing other facts, that one or another of these inferences, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact.”¹³⁹

Melvin Hicks argued in the Supreme Court that “[t]he litigation decision of the employer to place in controversy only . . . particular explanations eliminates from further consideration the alternative explanations that the employer chose not to advance.”¹⁴⁰ The employer should, Hicks argued, bear “the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons and therefore prevail.”¹⁴¹ When *St. Mary’s* articulated at trial its justification for Hicks’ dismissal—the disciplinary infractions—plaintiff’s counsel properly saw that as the focus of its attack in the final stage of the litigation. Because defendant never offered personal animosity as a reason, nor proffered evidence to that effect, plaintiff never had the “full and fair opportunity”¹⁴² at trial to challenge that scenario as pretextual. Hicks “had no reason to assume that he needed to rebut any

136. See generally GEOFFREY C. HAZARD ET AL., PLEADING & PROCEDURE 31-43 (7th ed. 1994).

137. See DEVITT, *supra* note 96, § 70.03. It is axiomatic that inferences “must rest on more than speculation and conjecture.” *Connell v. Bank of Boston*, 924 F.2d 1169, 1175 (1st Cir.), *cert. denied*, 501 U.S. 1218 (1991).

138. Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof*, 66 B.U. L. REV. 439, 473 (1986).

139. WIGMORE, THE SCIENCE OF JUDICIAL PROOF, *supra* note 113, § 13, at 28 (emphasis omitted). Underscoring the rejection in *Hicks* of the traditional model, the Third Circuit has explained:

[*Hicks*] makes clear that the trier of fact in a pretext case is not limited to a choice between finding that the alleged discriminatory motive or the employer’s non-discriminatory explanation was the sole cause of the employment action . . . [*Hicks*] instructs that this bipolar view of pretext cases is inaccurate.

Miller v. Gigna Corp., 47 F.3d 586, 596 (3d Cir. 1995) (emphasis added).

140. Brief for Respondent at 15, quoted in *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 523 (1993) (No. 92-602).

141. *Id.*

142. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

inference that personal animosity toward him was the possible reason for his termination."¹⁴³

Counsel's obligation in defending an employer accused of violating Title VII is to fully investigate the facts¹⁴⁴ and present them in court in a manner most advantageous to the client's cause.¹⁴⁵ There is no reason to surmise, as Judge Limbaugh apparently did, that counsel would withhold evidence critical to prevailing in court. And there is certainly no basis for converting this surmise into a defense to which plaintiff has no opportunity to respond.

It has been suggested that there may be situations where an employer will be unable or unwilling to explain its decision for reasons having nothing to do with unlawful discrimination. Justice Scalia puts forth a hypothetical case in which the supervisor who rejected the plaintiff is no longer employed by the defendant at time of trial, thus depriving defendant of knowledge as to the reasons for the decision not to hire.¹⁴⁶ Judge Easterbrook posits that a

143. Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Mud-dies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 445 (1994).

The First Circuit Court of Appeals made the point in a case involving a *Batson* challenge to the striking of a juror:

[T]here was no further comment from defense counsel by way of elaboration of his thought, objection, dissatisfaction with the prosecutor's explanation, or request for examination." At that point, if defense counsel felt that the trial court had failed to actually assess the prosecutor's credibility or had made a precipitous or erroneous judgment, it should have pointed this out. Counsel could have explained *why* the prosecutor's rationale was "outrageous," "made no sense," and did not deserve to be credited. The prosecutor then could have elaborated his reasons, and the court [could have made its findings].

United States v. Perez, 35 F.3d 632, 637 (1st Cir. 1994) (citations omitted).

The basic requirement for a timely objection stating the specific ground therefor set out in FRE 103(a) is similarly designed to "enable opposing counsel to take proper corrective measures." Fed. R. Evid. 103 advisory committee's note.

144. See FRCP 11 (obligation of counsel to make "inquiry reasonable under the circumstances."). As the Third Circuit has recently observed, the "persistence in maintaining that the employment action was taken because the plaintiff was unqualified . . . when the employer knows that the real reason is nepotism would violate the spirit if not the language of Rule 11." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1070 (3d Cir. 1996), *petition for cert. filed*, 65 USLW 3571 (U.S. Feb. 3, 1997) (No. 96-1231).

145. The obligation placed on the employer to rebut a prima facie case with articulated reasons for the action (a key element of *McDonnell Douglas* that the *Hicks* majority is quite comfortable with) departs from the usual notion that "the counter-story [presented by a defendant] need not involve presenting a case or even a different version of the events. It may simply be a story, conveyed through cross-examination, that the plaintiff's version of events is not to be believed." Lempert, *supra* note 138, at 472 n.73.

146. See *Hicks*, 509 U.S. at 513. Professor Lempert offers a similar example where an "injustice may result when the plaintiff's claim is improbable . . . but an innocent defendant cannot be expected to know much about what really happened":

A malpractice action brought by a child of ten claiming that the doctor who delivered him did so negligently and thus caused a tremor that began affecting his arm at age nine. The doctor may have no recollection of the delivery, and thus cannot offer a counter-story. All the doctor can do is defend that whatever the cause of the tremor, it did not result from the delivery.

public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that "we were just following the rules." The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision.¹⁴⁷

Other courts have formulated scenarios where the evidence demonstrates that the employer offered a pretextual explanation to cover its own acts of embezzlement,¹⁴⁸ or to protect a business secret or the reputation of an employee who had engaged in undesirable conduct.¹⁴⁹

These hypotheticals, obviously somewhat eccentric in their facts, do not convincingly support a general rule that proof of pretext no longer justifies a conclusion of discrimination in the routine case.¹⁵⁰ The employer in Scalia's hypothetical, for example, can reasonably be expected to reconstruct the decision from records or from the testimony of current employees (as suggested by the dissenters).¹⁵¹ If this is not possible, why is the employer entitled to more favorable treatment in the courts than any other litigant who, for whatever reason, is unable to produce evidence in support of its cause?

More perplexing is the point of the other hypotheticals. Where defense counsel discovers before trial that her client offered a pretextual reason to the employee to conceal some lawful but embarrassing reason, counsel can (and indeed should) present that evidence to the factfinder as a defense to the Title VII claim. Although counsel's situation is, of course, more difficult if she discovers that the real reason was itself unlawful, her responsibility seems equally clear—she is precluded, at the least, from putting on testimony she knows to be false. In this regard the Court has recently held that an employer may successfully rebut a *prima facie* case even though the reason articulated is illegal under another statute.¹⁵² An em-

Surely we do not wish to impose the costs of discovering the cause of the plaintiff's condition [which may be ultimately discoverable] on the defendant doctor.

Lempert, *supra* note 138, at 472 (internal quotes omitted). Recognizing the unique problems of proof in disparate treatment cases as well as the likely access defendants will have to the reasons for their own personnel decisions, *McDonnell Douglas* does impose that cost on an employer facing a *prima facie* case.

147. *Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

148. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n.3 (1st Cir. 1994).

149. *See Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995).

150. To fashion a rule from scenarios like Justice Scalia's is akin to designing air bags to inflate at a speed of 200 mph so that 165 pound males who are not wearing their seatbelts are protected, even though that speed of inflation will severely injure or kill persons of smaller size, especially children. *See, e.g., Ford to Use Less Powerful Airbags*, Bos. *GLOBE*, Apr. 25, 1997, at E2.

151. *See Hicks*, 509 U.S. at 539 n.12.

152. *See Hazen Paper Co. v. Biggins*, 507 U.S. 612-13 (1993) (a motive to deprive plaintiff of his pension, while illegal under ERISA, may nonetheless be raised in response to a charge of age discrimination case under the ADEA).

ployer may thus explain away at trial the earlier proffer of a pretextual reason. If the employer persists at trial in relying upon the pretext originally offered, it is not unreasonable to impose on it the risk of loss.

A litigant who deliberately withholds evidence from the court should certainly not be permitted to benefit from speculation as to how such evidence *might* relieve it of liability. Quite the contrary is typically the case—the failure of a party to present available evidence that it would be reasonably expected to present in its cause gives rise to a universally recognized inference that the evidence would have been unfavorable to the party.¹⁵³ The employer who fails to put on exculpatory evidence must accept the consequences when a rational decision is rendered in the absence of such evidence.

As Judge Easterbrook wrote in affirming dismissal of a Title VII action that he concluded had considerable merit, but in which plaintiff's counsel was faulted for presenting a key issue "too obliquely" at trial,

Each party must sharpen his own claims; those left in amorphous form by counsel need not be honed and decided by the judge. [Plaintiff] is bound by the litigation strategy in the district court. The judge addressed and resolved the matters presented to him. We are not sure that [plaintiff] received her due from [her employer], but we have no doubt that she received her due from the district court.¹⁵⁴

In his insightful article, *A Reconceptualization of Civil Trials*,¹⁵⁵ Professor Ronald Allen proposes that we conceive of the factfinder's task as comparing the probability of the plaintiff's version of events to the probability of the defendant's version.¹⁵⁶ This would limit the factfinder to choosing between the "competing versions of reality" advanced by the par-

153. See generally DEVITT, *supra* note 96, §§ 72.15-72.16; LIACOS, *supra* note 109, § 5.11; 2 WIGMORE ON EVIDENCE § 285 (Chadbourn rev. 1979). The inference is permissive, not mandatory.

Professor Lempert thus concludes that where the factfinder determines that there is a third explanation of the events, different than the two presented by the opposing parties, a "spoliation inference" arises:

The third explanation that was obvious to the factfinder should have been obvious to the defendant as well. The defendant's failure to offer evidence in support of this possibility suggests that the defendant, and perhaps the plaintiff as well, knows from evidence not presented that this apparently plausible theory is not supported by the facts.

Lempert, *supra* note 138, at 473-74.

154. *Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 149 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987). In a similar vein, Judge Torres has suggested that unless some *other* nondiscriminatory reason is cited by the employer, the factfinder's choice is between the stated reason and pretext. See *Connell v. Bank of Boston*, 924 F.2d 1169, 1181 (1st Cir. 1991) (concurring opinion).

155. 66 B.U. L. REV. 401 (1986) [hereinafter Allen, *A Reconceptualization of Civil Trials*]. See also Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991) [hereinafter Allen, *The Nature of Juridical Proof*].

156. See Allen, *A Reconceptualization of Civil Trials*, *supra* note 155, at 425. This is in contrast to what Allen considers the prevailing conception comparing the plaintiff's case to its negation.

ties, as opposed to a "rogue" scenario of its own.¹⁵⁷ It would require defendant to specify its case with particularity, just as plaintiff is presently required to do, thus leading to a sharper focus on disputed matters and discouraging the assertion of dubious defenses designed only to muddy the waters.¹⁵⁸ Such an approach, Allen argues, is particularly appropriate in litigation where the issue of mental state is central, for there we are dealing with "whether a richly textured human episode occurred, and if so, its nature. Answering these questions requires finding an interpretation that best explains a complex set of interrelated data."¹⁵⁹

In describing the factfinder's task under the original *McDonnell Douglas/Burdine* framework, the Supreme Court adopted this very conception: it must decide "which party's explanation of the employer's motivation it believes."¹⁶⁰ Or, as the Fourth Circuit put it: "the motivational issue [is] recast by the defendant's proffered explanation into the more specific form of whether as between the plaintiff's [race] and the defendant's proffered reason, [race] is the 'more likely.'"¹⁶¹ The notion that "the decisionmaker's task is merely to compare the evidential weight provided by the parties for their respective factual assertions"¹⁶² makes eminent sense in this context.

157. See *id.* at 432. As Professor Allen points out, the factfinder "does not know how to evaluate [possible scenarios] for which no evidence has been produced." *Id.* at 434. See also Lempert, *supra* note 138, at 473 (if no evidence suggests explanations other than those presented by the parties, the factfinder "will not be conscious of other possibilities and so will not accord them some probability."). Even in the traditional conception of litigation,

fact finders may decide not to rely on the story which they have formulated. Even though that story may be the best explanation they can contrive, there may not be enough evidence available to give them confidence in any judgment. Alternatively, even if they believe they have a fairly complete account of events, there may not be enough evidence on one point in the story to enable them to decide whether a critical part of it is true.

Craig Callen, *Kicking Rocks With Dr. Johnson: A Comment on Professor Allen's Theory*, 13 CARDOZO L. REV. 423, 438 (1991).

Allen compares the goals of litigants to that of historians, who in their competing historical visions seek to advance the most plausible explanation that captures the relevant data. See Allen, *The Nature of Juridical Proof*, *supra* note 155, at 387-89. "[T]he battle is fought at the level of competing visions, not at the level of individual fact, and factual details are put to the service of establishing that the organizing vision is more likely than those offered in opposition." *Id.* at 390.

158. See Allen, *A Reconceptualization of Civil Trials*, *supra* note 155, at 426. Professor Allen reminds us that the "common law system of pleading had as its objective the narrowing and clarifying of the range of factual dispute." *Id.* at 435. This role is now played by discovery. An employer will typically be required to state during discovery the reasons it claims it took the challenged action, and those reasons properly become the focus of plaintiff's attention. Under the *Hicks* regime, plaintiff relies on those reasons at her peril.

159. Allen, *The Nature of Juridical Proof*, *supra* note 155, at 393.

160. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

161. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 241 (4th Cir. 1982). Courts entertaining *Batson* challenges (see discussion *supra* note 115) similarly view their task as choosing between the opposing explanations of the juror strike. See, e.g., *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994) ("the trial court must choose whether to believe the prosecutor's race-neutral explanation or to find that the explanation was pretext to cover race-based motives").

162. Allen, *A Reconceptualization of Civil Trials*, *supra* note 155, at 436. Professor Allen compares this situation to the situation in criminal trials, where

What makes no sense is requiring the plaintiff to disprove theories not put into play by defendant. Even in criminal cases where the burden on the government is most severe, the prosecution "need not exclude every reasonable *hypothesis* of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt."¹⁶³ The Supreme Court has rejected speculation about what unstated lawful motives a defendant may have had in the context of the recent reverse discrimination gerrymandering cases.¹⁶⁴ The Court, however, veers from this familiar path in *Hicks*, effectively placing upon plaintiffs the burden of proving discrimination beyond any doubt.

C. The "Personality" Excuse as the Ultimate Pretext

Justice Powell in *McDonnell Douglas Corp. v. Green* emphasized that Title VII "tolerates no racial discrimination, subtle or otherwise."¹⁶⁵ Thus "[u]nthinking discriminatory treatment can meet the threshold of intentional discrimination, because an employer has some obligation under Title VII to think."¹⁶⁶ These admonitions are forgotten when the Court in *Hicks* buys into a clear dichotomy between *unlawful* discriminatory motive and *lawful* personality clash. In this context, where (as Judge Limbaugh found) a minority is specifically targeted for termination, can the connection between personal dislike and race be so readily discounted?¹⁶⁷

[The objective] is not to choose among the stories of the parties. Rather, it is to determine whether or not the only plausible explanation of the event in question is that the defendant is guilty as charged. . . . To do so requires that the government not only establish its own case but negate any reasonable explanation of the relevant affairs consistent with innocence.

Id.

163. *United States v. Systems Architects, Inc.*, 757 F.2d 373, 377 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985) (emphasis added). For a discussion of the movement away from requiring an instruction that circumstantial proof must exclude every reasonable possibility of innocence, see Irene Merker Rosenberg & Yale L. Rosenberg, "Perhaps What Ye Say Is Based Only on Conjecture"—*Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371, 1390-1402 (1995).

164. *See Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996) & discussion *supra* note 119.

165. 411 U.S. 792, 801 (1973).

166. *Walton v. Cowin Equip. Co.*, 774 F. Supp. 1343, 1348 (N.D. Ala. 1991). Although the crux of a disparate treatment case is proving "intent" to discriminate, it has long been held that such intent does not require proof of actual prejudice or animus. Rather, "intent" means simply that the employer is treating "some people less favorably than others *because of* their race, color, religion, sex, or national origin," *International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), even if the underlying reason for the different treatment is benign or unconscious. *See, e.g., Vaughn v. Edel*, 918 F.2d 517, 523 (5th Cir. 1990) (fact that treatment of black employee was motivated by benign self-interest rather than racial hostility or prejudice is irrelevant where treatment was because of race). On the requirements for proving "intent" under the statute, see generally Mark S. Brodin, *Fault and Motive*, *supra* note 15.

"Intentional" as defined by psychologists involves choice: If the actor has alternatives and chooses one, the act is intentional. *See Susan T. Fiske, Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 626 (1993) [hereinafter Fiske, *Controlling Other People*].

167. As Professor Calloway has astutely observed regarding Limbaugh's finding:

In other words, Hicks' supervisors just didn't like him. But doesn't that beg the question? Why didn't they like him? When a black man is not liked, absent evidence that he possesses

The recognition of so generous a "personality" defense reflects a failure and refusal to appreciate the subtleties of the discrimination phenomenon. What the *Hicks* majority sees when it envisions discrimination is a bigot acting out of clearly defined ill-will and wearing his prejudice on his sleeve. We know, however, that "racial stereotyping, prejudice, and hostility still operate indiscriminately, despite the actual identities and achievements of the black individuals discriminated against. . . . While much antiblack thinking is conscious, some is so deeply embedded in white assumptions and perspectives as to be half-conscious or even unconscious."¹⁶⁸ As Blumoff and Lewis consequently observe:

If racial and gender stereotyping are pervasive, it is not at all clear that one should assume sufficient independent "legitimate" employer motivation. In fact, precisely because racist and sexist thoughts are so deeply imbedded in our cultural belief system, the idea that one can distinguish among such motives, especially where one of them is subscribed to unconsciously, reflects a false dichotomy.¹⁶⁹

undesirable characteristics peculiar to him, isn't it more likely than not that the source of the dislike is his race?

Calloway, *supra* note 116, at 1022-23. Yet courts are often dismissive of the potential connection. See, e.g., *Iturbe v. Wandel & Golterman Techs., Inc.*, No. 93-1654, 1994 WL 118103, at *4 (4th Cir. Apr. 4, 1994) (per curiam) (unpublished opinion) ("Personal animus between a supervisor and employee is not indicative of racial animus."); *Beltz v. Quaker Oats Co.*, No. 94 C 767, 1995 WL 505469, at *10 (N.D. Ill. Aug. 18, 1995) ("Personality conflicts are not the business of the federal courts.").

168. JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* ix, 23 (1994). There is now an extensive legal literature on racial and gender stereotyping. See generally Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 955, 1007 n.188 (1982); Blumoff & Lewis, *supra* note 7, at 58-66; Fiske, *supra* note 166; Krieger, *supra* note 15; Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980); Note, *Invisible Man: Black and Male Under Title VII*, 104 HARV. L. REV. 749, 756-59 (1991).

On unconscious discrimination, see generally Charles A. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995); Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 15; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

The continued pervasiveness of racism in our society is evidenced by a recent study in the New England Journal of Medicine documenting racial disparities in the provision of medical services. "Evidence is strong that medical providers are subconsciously racist" concludes the accompanying editorial in NEJM. Richard A. Knox, *Medicare Services Show Inequalities*, BOSTON GLOBE, September 12, 1996, at A3. For a discussion of the impact of cultural expectations on perception, see Oppenheimer at 909 (& citations).

169. Blumoff & Lewis, *supra* note 7, at 49 (internal quotations omitted). The naivete in this area is reflected in the simplistic nature of instructions to the jury. Typical are the following:

The issue you are to decide is whether plaintiff's sex was a *determinative factor* in the defendant's discharge of plaintiff. The issue is not whether the plaintiff was treated fairly or whether there was a personality conflict between the plaintiff and her superiors or whether she was treated differently than other employees or whether the defendant made sound management decisions.

Hook v. Ernst & Young, 28 F.3d 366, 369-70 (3d Cir. 1994).

In her ground-breaking article Professor Taub documented the impact of sex-based biases and stereotypic role expectations on perceptions of women's work.¹⁷⁰ Another writer recently concluded that "categorization based on race, sex, or national origin may distort perception, memory, and recall for decision-relevant events such that, at the moment of decision, an employer may be entirely unaware of the effect of an employee's group membership on the decisionmaking process."¹⁷¹ What may at first glance look like "personality clash" idiosyncratic to the particular employee may, in fact, be something very different and far more menacing.

Professor Charles Lawrence has persuasively argued that racism is often unconscious precisely because the actor, aware of the normative stance against bigotry in our society, may as a matter of guilt-avoidance deny his or her own discriminatory beliefs and ideas.¹⁷² By process of rationalization, people tend to view their actions as stemming from good rather than bad motives.¹⁷³ Moreover, racism is transmitted by the culture in ways so subtle that individuals may be unaware of their own biases, which simply become "part of the individual's rational ordering of her perceptions of the world."¹⁷⁴

With reference to the workplace, it has been observed that [m]any white managers and supervisors have had little contact with blacks; they may never have seen a black executive or may have only seen blacks in menial positions or as entertainers, athletes, or criminals in the mass media. Many live in exclusively, or almost exclusively, white suburbs. A white manager with this limited experience, drawing on his or her images of blacks only from stereotypes, may select another white person over an equally or better qualified black person because of deep-lying, even unconscious, feelings that the white candidate is more compatible or competent.¹⁷⁵

To be sure, *McDonnell Douglas* itself may have been overly optimistic in its confidence in the ability of courts to separate lawful from impermissible motives. The task, however, seems unavoidable given the Manichean world envisioned by Title VII.

170. See Taub, *supra* note 168, at 353-54.

171. Krieger, *supra* note 15, at 1167. Krieger challenges the motivation-based definition of discrimination which assumes that decisionmakers possess "transparency of mind", *i.e.*, that they can accurately identify the reasons for their decision. See *id.* As she writes,

To say that a decisionmaker made an employment decision *because* of someone's race or sex is not the same as saying that the decisionmaker meant to take that group status into account. An employee's group status may have affected the decisionmaker in completely nonconscious ways by affecting what he saw, how he interpreted it, the causes to which he attributed it, what he remembered, and what he forgot.

Id. at 1170.

172. See Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 15, at 322-23.

173. See KLINEBERG & YINGER, *supra* note 13, at 443.

174. Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 15, at 322-23. Lawrence speaks of the "collective unconscious" by which he means "the collection of widely shared individual memories, beliefs, and understandings that exist in the mind at a nonreporting level." *Id.* at 323 n.26.

175. FEAGIN & SIKES, *supra* note 168, at 153-54. The manager may "honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candi-

It is thus not surprising that "a common accusation against black managers in corporate workplaces is that they are not 'team players.'"¹⁷⁶

The Supreme Court is certainly not unaware of the problem of stereotyping. *Price Waterhouse v. Hopkins*¹⁷⁷ presented a situation in which a highly successful female associate was denied partnership in a process permeated with sex stereotyping, including advice that in order to improve her chances she should "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁷⁸ The Court held that an employer who acts on the basis of stereotypes, such as the belief that women are not, or should not be, aggressive in the workplace, is in violation of Title VII.¹⁷⁹ Moreover, the court recognized that "personality problems" and "poor interpersonal skills" do not constitute legitimate reasons for adverse action against an employee where the "problems" themselves reflect bias or disparate treatment:

[E]ven if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.¹⁸⁰

date as 'more articulate,' 'more collegial,' 'more thoughtful,' or 'more charismatic.' He is unaware of the learned stereotype that influenced his decision." Lawrence, *The Id, the Ego, and Equal Protection*, *supra* note 15, at 343.

Under established doctrine, the prejudicial motivation of the middle manager or supervisor is imputed to the employer who acts upon their recommendation. See *Slack v. Havens*, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975); *Trustees of Forbes Library v. Labor Relations Comm'n*, 428 N.E.2d 124, 130 (Mass. 1981) ("An employer should not be permitted to insulate its decision by interposing an intermediate level of persons in the hierarchy of decision, and asserting that the ultimate decision makers acted only on recommendation, without personal hostility toward protected activity.").

176. FEAGIN & SIKES, *supra* note 168, at 157.

177. 490 U.S. 228 (1989). See generally Gudell, *supra* note 15, 52-70; Steven M. Tindall, *Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 BERKELEY J. EMP. & LAB. L. 332 (1996).

178. *Hopkins*, 490 U.S. at 325. Hopkins had played a key role in securing a \$25 million contract for the firm with the Department of State. See *id.* at 334.

179. See *id.* at 258. The American Psychological Association filed an amicus brief reviewing the literature on sex stereotyping and arguing that it biases the evaluation of women's job performance, especially for those in traditionally male jobs. See Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049, 1053 (1991) [hereinafter Fiske, *Social Science Research on Trial*].

180. 490 U.S. at 258. Dr. Susan Fiske, a social psychologist, testified at trial that "Hopkins' uniqueness (as the only woman in the pool of candidates [for partner]) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping . . ." 490 U.S. at 235-36. Her further insights into the case can be found in Fiske, *Controlling Other People*, *supra* note 166, and Fiske, *Social Science Research on Trial*, *supra* note 179.

The *Hicks* Court, in requiring a plaintiff to, in effect, affirmatively prove the underlying racial or gender bias behind "personality conflict," sadly forgets the lessons learned in *Hopkins*.

The "personality" defense also ignores the distinct possibility, documented in the social science literature, that the minority or female employee has been negatively affected by the constant indignities of a discriminatory workplace. "It is difficult to overestimate the effects on personality of belonging to a group which is generally regarded as inferior and so treated."¹⁸¹ "In the immediate situation or over the long haul, discrimination can generate determination, embarrassment, frustration, bitterness, anger, rage, and any combination of these feelings. Discrimination is an energy-consuming, life-consuming experience. The enduring, cumulative impact of white racism has rarely been understood by white Americans."¹⁸² "The psychological costs to African Americans of widespread prejudice and discrimination include. . . rage, as well as humiliation, frustration, resignation, and depression. Such high costs require major defensive strategies."¹⁸³ One such strategy is to put on a defensive shield, directing blame and anger at whites in the workplace.¹⁸⁴ If Melvin Hicks did in fact have a hard edge (which was not demonstrated by the record evidence), might that have resulted from "the crusade" the district court found¹⁸⁵ had been waged against him by his white supervisors?

It is widely recognized that subjective criteria are often a "disguise for discriminatory action."¹⁸⁶ Subjective employment decisions "allow for the expression both of conscious bias and of the unconscious bias that is likely to result in the exclusion of persons who are visibly different from those doing the selecting."¹⁸⁷ The social psychology literature amply demon-

181. KLINEBERG & YINGER, *supra* note 13, at 444.

182. FEAGIN & SIKES, *supra* note 168, at 23.

183. *Id.* at 294. For an insightful description of the debilitating effects of race discrimination, see Judge Skelly Wright's discussion in *United Packinghouse, Food & Allied Workers Int'l Union v. NLRB*, 416 F.2d 1126, 1136-38 (D.C. Cir. 1968). See also KLINEBERG & YINGER, *supra* note 13, at 444-45.

184. See FEAGIN & SIKES, *supra* note 168, at 294-96.

185. See *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

186. *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1399 (6th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

187. *Bartholet*, *supra* note 168, at 955. As one court put it, "it is perfectly believable that a supervisor could act out of a discriminatory animus by routinely reviewing women or minorities in a harsher fashion or refusing to serve as a mentor or advisor for anyone but members of his race or sex." *Prizevoits v. Indiana Bell Tel. Co.*, 882 F. Supp. 787, 794 (S.D. Ind. 1995). See also *Evans v. Connecticut*, 935 F. Supp. 145, 159-60 (D. Conn. 1996):

Defendants' witness Lt. Col. Mulligan stated, in effect, that plaintiff's "attitude of indifference" was also a reason for plaintiff's termination. The court is unable to overlook the fact that this evaluation is inextricably intertwined with the bias evident in Mulligan's testimony concerning the new recruits of color who Mulligan believed did not have the requisite "desire" to become troopers. The subjective assessment concerning plaintiff's attitude, made during a brief meeting at which the very palpable threat of plaintiff's termination loomed large, was more likely than not a product of Mulligan's own predisposition rather than a lucid and unbi-

strates that individuals tend to evaluate members of their own reference groups more favorably than non-members.¹⁸⁸ One text notes that "the more subjective the standard by which employees or applicants are to be judged and the more informal the manner in which they are evaluated, the more likely that the court will find the employer's justifications pretextual when faced with evidence from which discrimination could be inferred."¹⁸⁹

"Personality" is the quintessential subjective criterion,¹⁹⁰ and the "personality" defense is thus an open invitation to discrimination, either conscious or unconscious. Extrapolations from it include the familiar "she doesn't work well with others," as well as the ever popular "she's not management material," or "there's a perception that she is not management material."¹⁹¹

Several courts have explicitly recognized (as did the dissenters in *Hicks*)¹⁹² the potential for misuse and abuse presented by the "personality clash" defense.¹⁹³ Some decisions explicitly reveal the use of "personality"

ased evaluation. The court cannot simply ignore the undercurrent of bias that erodes Mulligan's credibility on this issue. Accordingly, defendants' final reason for purportedly terminating plaintiff—that he had an "attitude of indifference"—was, in effect, a euphemism for "plaintiff was black."

The problem for plaintiffs is proving the underlying animus, as illustrated by the dismissal of *Privevoits'* case on summary judgment because "[a]t best, Privevoits has made a showing of personality conflict and a possibly unresponsive or mediocre supervisor." *Privevoits*, 882 F. Supp. at 794.

188. See, e.g., Martin F. Sherman et al., *Racial and Gender Differences in Perceptions of Fairness: When Race is Involved in a Job Promotion*, 57 PERCEPTUAL & MOTOR SKILLS 719, 720 (1983).

189. *FRIEDMAN & STRICKLER*, *supra* note 91, at 118. As Judge Eschbach put it, "[t]his case illustrates the risk employers take when they make employment decisions based on essentially subjective judgments about qualities such as 'interpersonal skills.' Although relying on subjective factors is not *per se* illegal, the jury may, under some circumstances, reasonably consider subjective reasons as pretexts for discrimination." *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427-28 (7th Cir. 1992) (citations omitted). One Circuit has limited the defense as follows: "Subjective reasons are sufficient if they result from investigation into the employee's character and performance, but preferences cannot be sufficient if they simply emanate from the subconscious of the decisionmaker without any specific basis." *Tye v. Board of Educ.*, 811 F.2d 315, 320 (6th Cir.), *cert. denied* 484 U.S. 924 (1987). See also *Welch*, *supra* note 15, at 743 (courts should police every instance in which subjective judgment may be tainted by unarticulated, unconscious assumptions regarding gender). But see *Tingley v. Henson Aviation, Inc.*, 789 F.2d 275, 277 (4th Cir. 1986) (upholding utilization of subjective behavior traits observed by male pilots in decision to terminate first female pilot hired by employer; plaintiff's evaluations were generally satisfactory, but included comment that "she can get critically nervous in a tight situation.").

190. While it might be claimed that there are "objective" personality profiles and tests, their validity has been frequently challenged. See, e.g., *Corneveaux v. CUNA Mut. Ins. group*, 76 F.3d 1498, 1503-05 (10th Cir. 1996).

191. *FEAGIN & SIKES*, *supra* note 168, at 150-51.

192. See 113 S. Ct. 2742, 2766.

193. See, e.g., *O'Connor v. Peru State College*, 781 F.2d 632, 637 (8th Cir. 1986) (while inability to function compatibly with other workers can be a legitimate reason for discharge, "when the lack of harmony germinates from the sex discrimination, the two cannot be artificially separated."); *Patterson v. Masem*, 774 F.2d 251, 256 (8th Cir. 1985) (warning that subjective factors such as lack of judgment or interpersonal skills "must be closely scrutinized because of the opportunities for discriminatory abuse," and that plaintiff's abrasiveness and the antagonism of her colleagues could not be legitimate factors justifying her rejection "to the extent that these reactions are the result of her peers' racism or their disagreement with her apparent activism regarding desegregation and civil rights"); *Hickman v. Valley*

as a pretext.¹⁹⁴ The open-ended defense accepted in *Hicks*, however, imperils effective enforcement of Title VII's protections.

Radovanic v. Centex Real Estate Corp.,¹⁹⁵ a pre-*Hicks* case, is illustrative. Plaintiff alleged that she was discharged from her position as a building construction superintendent trainee because she became pregnant. She had been promoted from a clerical job before becoming pregnant, but was terminated shortly after advising her employer of her pregnancy. The district court rejected three of the employer's explanations for her termination—poor performance, lack of construction skills, and complaints from customers.¹⁹⁶ It further found that Radovanic's male supervisors had failed "to take an active and aggressive role in her training" and had provided inaccurate negative information about her to management prior to her discharge.¹⁹⁷ Moreover, Radovanic was never warned that her job was in jeopardy prior to termination.¹⁹⁸

Notwithstanding these findings, the district court went on to credit the employer's assertion of "bad attitude" as a nondiscriminatory justification for her termination: "Defendant has introduced convincing evidence that Plaintiff lacked the necessary behavior traits to be an effective superintendent. An employer can legitimately emphasize interpersonal skills in employment decisions, as long as the employer does not sex stereotype."¹⁹⁹ The court found that plaintiff was not sufficiently aggressive, but was instead "passive" and "lacked initiative."²⁰⁰ After notifying her employer

Local Sch. Dist. Bd. of Educ., 619 F.2d 606, 609-10 (6th Cir. 1980) (where personality conflict between teacher and principal arose from teacher's protected union activities, that conflict could not justify the discharge of the teacher); *Trustees of Forbes Library v. Labor Relations Comm'n*, 428 N.E.2d 124, 131 (Mass. 1981) (employee's refusal to accept authority and consequent tension with supervisors cannot be lawful reason for discharge when the authority was used to suppress protected activity). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (Brennan, J., plurality opinion) (personal animosity can result from reaction to a woman who is viewed as "too aggressive").

194. See, e.g., *Corneveaux*, *supra* note 190, at 1503 (personality conflicts raised by employer were minor incidents for which no action was taken or reports filed); *Giacoletto*, *supra* note 189, at 426-27 (although there was strong evidence that plaintiff was in fact rude and uncommunicative, as employer asserted, jury was entitled to conclude those defects were not the real reasons for plaintiff's termination; although performance evaluations consistently indicated plaintiff had poor interpersonal skills, he was an effective manager).

195. 767 F. Supp. 1322 (W.D.N.C. 1991).

196. See *id.* at 1328-30.

197. See *id.* at 1326, 1328-29.

198. See *id.* at 1327-28.

199. *Id.* at 1333.

200. *Id.* at 1330. The problem of sex-stereotyping of females in non-traditional jobs has been well documented. See, e.g., *Fiske*, *supra* note 166 (being a manager is a "stereotypically masculine job, calling for tough, aggressive behavior; consequently people think there is a lack of fit between being a woman and being a manager.").

In a field study confirming the literature on sex stereotyping, male-female differences in performance ratings were examined across a wide variety of jobs and organizations. Women received lower ratings when the proportion of women in the group was small, even after cognitive ability, psychomotor ability, education, and experience differences were controlled for. See Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-*

that she was pregnant, she "became withdrawn and uninterested" in her work.²⁰¹

The district judge made his own observation of plaintiff as she testified at trial, describing her as "lackadaisical, uninterested and withdrawn."²⁰² Radovanic thus lacked the "behavior traits to be an effective superintendent. What a person knows is not the only criteria needed to be effective in a given job; who a person is also enters into the applicable qualifications for the job."²⁰³ The fact that plaintiff was a female and pregnant was, the court concluded, "of no significance in Defendant's decision to terminate her."²⁰⁴

A May 15 meeting between Radovanic and management was identified by the court as the turning point in her work performance. "[B]efore the meeting, Plaintiff had a positive attitude and was attempting to learn the skills needed to become a superintendent. After the meeting, Plaintiff's attitude was negative and she became withdrawn and uninterested."²⁰⁵ It was at this meeting that Radovanic informed her employer that she was pregnant.²⁰⁶ Management then proceeded to criticize her performance on the basis of what the court found was inaccurate information. The court nonetheless found: "Although much of the [negative] information relied on [during the meeting] was inaccurate, Plaintiff's response was not to prove [her

Black Differences in Performance Ratings, 76 J. APPLIED PSYCHOL. 263 (1991). The rarity of women in the setting in which they are evaluated promotes sex-stereotyping. *Id.* at 263.

201. 767 F. Supp. at 1330.

202. *Id.* Jerome Frank's observation that the judge as factfinder is also a witness at the trial is apropos here. The judge, he wrote, is

a witness of what is occurring in his courtroom. He must determine what are the facts of the case from what he sees and hears; that is, from the words and gestures and other conduct of the witnesses. And like those who are testifying before him, the judge's determination of the facts is no mechanical act. . . . If his final decision is based upon a hunch and that hunch is a function of the 'facts,' then of course what, as a fallible witness of what went on in his courtroom, he believes to be the 'facts,' will often be of controlling importance. So that the judge's innumerable unique traits, dispositions and habits often get in their work in shaping his decisions not only in his determination of what he thinks fair or just with reference to a given set of facts, but in the very process by which he becomes convinced what those facts are.

JEROME FRANK, *LAW AND THE MODERN MIND* 118-19 (1970).

For a contrasting example of a judge extrapolating from plaintiff's demeanor on the witness stand to plaintiff in the workplace, see *Curler v. City of Fort Wayne*, 591 F. Supp. 327, 334 n. 4 (N.D. Ind. 1984). In rejecting defendant's justification for not hiring plaintiff for the position of kennel worker, that he was nervous during his interview and thus would not work well with animals, the judge observed:

[P]laintiff's testimony from the witness stand was not overshadowed with a "nervous" appearance. To the contrary, plaintiff answered questions on both direct and cross-examination with little appearance of being "nervous." One would think that examination and cross-examination in a court such as this would propel "nervous" people to exhibit such symptoms, but no such exhibitions emanated from plaintiff during his testimony.

Id.

203. 767 F. Supp. at 1331.

204. *Id.*

205. *Id.* at 1330.

206. *See id.* at 1328.

supervisor] wrong by doing an excellent job. Rather, Plaintiff appeared to sulk and to give up.”²⁰⁷

The judge seemed completely oblivious to the “rejection and pain associated with [a] negative performance rating,” as well as the fact that in “some situations [of discriminatory treatment] resigned acceptance may be the only realistic response.”²⁰⁸ As in *Hicks*, there was no recognition that the perceived personality or behavior deficiency may have been a direct result of the very discriminatory treatment complained of.²⁰⁹

Defendants have raised the “personality defense” with success in numerous situations that should have given the courts more pause. In *McNairn v. Sullivan*,²¹⁰ for example, a woman of African/Hispanic descent challenged her termination from employment as a clerk/typist with the Food & Drug Administration. Notwithstanding testimony from the official who was second in command that the office director had discriminated against plaintiff and that the director’s assertion of plaintiff’s poor work performance was pretextual, the court rejected her claim. It found that plaintiff had a “caustic work attitude,” although it candidly recognized that “the perceived animus between plaintiff and her supervisors cloud the issue of the true motivation behind plaintiff’s termination.”²¹¹

*Williams v. Cerberonics, Inc.*²¹² involved a black female terminated from her position as an instructor with a defense contractor. Her supervisor testified that Williams had a “negative attitude” and was “defiant”; the evidence, however, showed that plaintiff had consistently received excellent or outstanding job evaluations prior to her termination.²¹³ There was testimony that plaintiff’s supervisor displayed open hostility to her,²¹⁴ and had said to a naval seaman that he did not want “that black uppity female” (referring to plaintiff) in the program.²¹⁵ The jury returned a verdict for the plaintiff, but the district judge granted the employer’s motion for a JNOV,

207. *Id.* at 1330.

208. FEAGIN & SIKES, *supra* note 168, at 26, 148. There is “an implicit pressure to fit a certain image; other people’s expectations create the starting point for one’s commerce with them. The easiest course for a stereotyped person is to stay within the bounds of those expectations.” Fiske, *Controlling Other People*, *supra* note 166, at 623.

209. See also *Charles v. Allstate Ins. Co.*, 932 F.2d 1265, 1267 (8th Cir. 1991) (plaintiff “accepted constructive criticism very poorly” from new manager after having been favorably reviewed by previous manager for two years). Some years ago I had occasion to represent a whistleblower in a lawsuit against the federal agency that fired him. The man had confidentially turned over documents to the FBI indicating corruption within the agency, but soon found himself the subject of disciplinary action when the FBI informed the agency head of his “disloyal” conduct. Realizing he had been betrayed, the man became distrustful and suspicious. His “paranoia” in turn became part of the justification offered by the agency for his discharge.

210. 929 F.2d 974 (4th Cir. 1991).

211. *Id.* at 979.

212. 871 F.2d 452 (4th Cir. 1989).

213. See *id.* at 461.

214. See *id.* at 463.

215. See *id.* at 456.

which the Fourth Circuit affirmed. In so doing the Court of Appeals acknowledged that the "personality conflict [between plaintiff and her supervisor] generated antipathy and professional incompatibility which might have made it more difficult for the plaintiff to perform. But this certainly does not translate into discrimination. An employer is not required to like his employees."²¹⁶ The court concluded that the "record, if anything, proves personal animus on the part of [plaintiff's supervisor], not racial animus."²¹⁷

*Patterson v. Masem*²¹⁸ upheld the trial judge's findings that the plaintiff, a black female teacher employed for 22 years by the Little Rock School District, had not been discriminated against when she was denied promotion to supervisor of English and Social Studies. Plaintiff had been recommended to the Board by the Superintendent, but they opposed her appointment and a white male was selected in her place. While he met the minimum requirements, unlike plaintiff he did not have a doctorate degree or experience in both of the academic disciplines covered by the position.²¹⁹ The reason articulated by the Board for plaintiff's rejection was that she was "abrasive, did not get along well with faculty and staff and was lacking in interpersonal and management skills."²²⁰ This was despite the fact that she had been subsequently appointed to the position of Supervisor of Human Relations, which listed as a job requirement "strong inter-personal skills in dealing with students, staff, administrators, and parents."²²¹ Conceding that the use of subjective factors "must be closely scrutinized because of the opportunities for discriminatory abuse" and noting that plaintiff's abrasiveness and the antagonism of her colleagues could not be legitimate factors justifying her rejection "to the extent that these reactions are the result of her peers' racism or their disagreement with her apparent activism regarding desegregation and civil rights",²²² the court nonetheless affirmed the district judge's findings against her as not clearly erroneous.

Finally in *Walker v. Nations Bank of Florida N.A.*,²²³ the Court of Appeals, while finding that the bank's stated explanation for terminating a female branch manager was pretextual,²²⁴ nonetheless ruled that plaintiff had failed to prove her case of age and gender discrimination. Although there was obviously "bad blood" between plaintiff and her supervisor, plaintiff had failed to prove it was anything other than personal dislike, an

216. *Id.* at 456-57 (citation omitted).

217. *Id.* at 457.

218. 774 F.2d 251 (8th Cir. 1985).

219. *See id.* at 253.

220. *Id.* at 255.

221. *Id.*

222. *Id.* at 256.

223. 53 F.3d 1548 (11th Cir. 1995).

224. *See id.* at 1557. A male manager under the age of forty was not disciplined when his branch received an unfavorable audit of the kind which assertedly justified plaintiff's termination. *See id.*

explanation (as in *Hicks*) not even proffered by the employer.²²⁵ "Serious personality clashes may be an unwelcome reality of the workplace, and may lead, as in this case, to unfortunate consequences for employees such as [plaintiff]. Nevertheless, such clashes do not, without more, form the basis for relief under Title VII or the ADEA."²²⁶

The personality excuse has also been used successfully to legitimize a supervisor's abusive conduct of an employee. In *Johnson v. Tower Air, Inc.*,²²⁷ a female flight attendant's claim of sexual harassment was rejected on a finding that her male supervisor "was not a pleasant person for whom or with whom to work; [but it is clear] that [the supervisor] was unpleasant to each member of the crew, irrespective of their sex; moreover, his comments to [plaintiff], although indisputably offensive, when examined in context appear far more hostile and angry than they do sexual. Behavior that is immature, nasty, or annoying, without more, is not actionable as sexual harassment."²²⁸ The supervisor had called plaintiff a "goddamn b***h," and remarked that what she needed was "a good f***."²²⁹

*Christoforou v. Ryder Truck Rental, Inc.*²³⁰ similarly rejected plaintiff's claims of sexual harassment, concluding:

In assessing the evidence of sexual harassment and tension that has been offered by plaintiff, it is important to note that although the difference is

225. See *id.* at 1560 (Johnson, C.J., concurring). "The district court [in reasoning adopted by the Eleventh Circuit] reasoned that, even if NationsBank lied when it offered its reasons for [plaintiff's] termination, the motivation behind the lie was equally likely to conceal personal animosity as to conceal discrimination." *Id.* There was no attempt to explain why the Bank and its counsel would run the risk of losing the case by offering a false explanation in order to conceal that a supervisor acted upon a perfectly legal dislike for an employee.

226. *Id.* at 1558. For other cases rejecting discrimination claims on the personality defense, see *Smallwood v. Jefferson County*, No. 95-5686, 1996 WL 490353 (6th Cir. Aug. 27, 1996) (unpublished opinion) (plaintiff failed to prove that gender discrimination, not personality conflict, was basis for termination); *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 144 (7th Cir. 1995) (plaintiff's complaints of sex harassment arose out of "a non-sexual personality clash between two aggressive individuals"); *Ezold v. Wolf, Block, Schorr, & Solis-Cohen*, 983 F.2d 509, 544 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1086-87 (7th Cir. 1991) (plaintiff's clashes with co-workers and supervisors, in which she was called a "religious nut," a "religious hypocrite," and "Bible Bertha" were result of personality, not religious discrimination); *Charles v. Allstate Ins. Co.*, 932 F.2d 1265 (8th Cir. 1991) (relationship between plaintiff and supervisors became "defensive and adversarial because of [plaintiff's] attitude," and her "aloof and somewhat hostile demeanor"); *Bruhwiller v. University of Tennessee*, 859 F.2d 419, 426 (6th Cir. 1988) (Nelson, C.J., dissenting) (plaintiff was not victim of sex discrimination but rather "on the wrong end of a personality clash"); *Burrows v. Chemed Corp.*, 743 F.2d 612, 615-16 (8th Cir. 1984); *Flowers v. Goldman, Sachs & Co.*, No. 93 C 7818, 1994 WL 605753, *2 (N.D. Ill. Nov. 3, 1994) (plaintiff failed to show that race discrimination, not poor work performance and personality conflicts with her supervisor, was the cause of her termination). See also *Sudimak v. Pillus*, 881 F. Supp. 152, 156 (M.D. Pa. 1995) (jury's answers to special verdict questions finding employer's proffered reason for termination untrue but also finding that discrimination was not determinative factor were not inconsistent; jury could have found there was personality clash between plaintiff and her supervisor).

227. 149 F.R.D. 461 (E.D.N.Y. 1993).

228. *Id.* at 469.

229. *Id.* at 463 n.2.

230. 668 F. Supp. 294 (S.D.N.Y. 1987).

elusive, there is a crucial difference between personality conflict and sexual harassment. It seems to the court that the tense history between plaintiff and [her employer] was more a matter of the former, which is unpleasant but legal, than the latter, which is despicable and illegal. The law does not require an employer to like his employees, or to conduct himself in a mature or professional manner, or unfortunately, even to behave reasonably and justly when he is peeved. . . . Thus, to the extent that [the employer's] decision to fire plaintiff was in fact influenced by this general personality conflict, and by [the employer's] own overbearing and volatile character, it is not legally vulnerable.²³¹

Interpersonal skills and personality characteristics can, of course, be properly weighed in personnel decisions.²³² The difficulty is the open-ended nature of this justification and the extent to which bias can so easily (yet subtly) enter into the equation.²³³

The risk of eviscerating Title VII's protections by permitting ready use of the personality defense is even clearer when we realize how vulnerable the judicial system is to unconscious bias. As Professor Leubsdorf has observed, the "story based on current stereotypes about how people do or should behave (including racial, gender, and class stereotypes) is often the easiest to tell, and the one most accessible to jurors."²³⁴ Jurors bring to the jury room a stock of knowledge based on their own experiences and obser-

231. *Id.* at 303. Compare *Zabkowicz v. The West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (rejecting defendant's contention that a male employee with plaintiff's same personality would have suffered equally brutal harassment), and *Yodovich v. Stone*, 839 F. Supp. 382, 389 (E.D. Va. 1993) (while one could argue there was a personality clash between Russian Jewish plaintiff and superior officer, it is clear it grew out of dislike for Russians and Jews).

232. See, e.g., *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976) (plaintiff's excessively disruptive behavior in sophisticated scientific research setting justified her discharge); *Lake v. Baker*, 662 F. Supp. 392 (D.D.C. 1987) (in which Judge Gesell details the plaintiff's irrational behavior, instability and interpersonal problems at the IRS).

233. "[S]tereotypes operate more freely on ambiguous criteria, such as judgments of interpersonal skills, than on unambiguous counting criteria, such as number of billable hours." Fiske, *Controlling Other People*, *supra* note 166, at 622.

234. John Leubsdorf, *A Comment on Ronald Allen's "The Nature of Juridical Proof,"* 13 CARDOZO L. REV. 455, 457 (1991). See also W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 171 (1981):

People who have different understandings about society and its norms may disagree about the plausibility of a story. If legal judgment is not just a process of adding up the "facts" in a case, then social and demographic differences between jurors may be significant. If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then jurors who come from different social worlds may disagree about the meaning and the plausibility of the same stories.

It has of course long been recognized that the very process of inductive reasoning is heavily influenced by the experiences of the fact-finder. Wigmore observed that the degree of strength of any inductive inference will vary "depending somewhat upon differing views of human experience with those facts." WIGMORE, *THE SCIENCE OF JUDICIAL PROOF*, *supra* note 113, § 12, at 27. "The inductive probability of the proposed conclusion on the facts before the court depends just on the extent to which the facts are favorable to some commonplace generalizations [in the minds of the jurors] that connect them to the conclusion." L. JONATHAN COHEN, *THE PROBABLE AND THE PROVABLE* 275 (1977). For a discussion of the conflict between the "rationalist" perspective on decision-making represented by Wig-

vations. It is thus noteworthy that Feagin & Sikes conclude from a number of opinion surveys that "somewhere between 20 and 35 percent of whites are very negative and exclusionary in their attitudes toward black Americans," and a majority of whites "accept some racial stereotypes, such as that blacks are less hardworking and more violent than whites."²³⁵

Beyond the problem of juror bias is that of juror indifference. Feagin & Sikes write:

A common white credo about racial relations today holds that discrimination is no longer a serious and widespread problem and that whatever blatant antiblack hostility remains is mostly that of isolated white bigots and Klan-type groups. In particular, middle-class African Americans are not viewed as victims of discrimination, but are seen as prosperous examples of the success of equal opportunity and affirmative action programs. Indeed, middle-class black Americans are thought by many whites to be the beneficiaries of racial quotas that have gone too far, to the point of "reverse discrimination. . . . They appear to be well integrated into middle-class America, and from a white perspective they have no real reason to link problems in their lives to skin color."²³⁶

If opinion polls are any indication, many white jurors are going to start off with the belief that minorities have already been given too much preference, and that racial injustice in employment is no longer a problem.²³⁷

more and the literature on juries which emphasizes emotional identification (with cause, client, or advocate), bias, etc, see ANDERSON & TWING, *supra* note 19, at 379-83.

Professor Allen concludes,

What counts as 'evidence' is what sways a factfinder. That will be in part what is contained in the formal proffers at trial. In much larger part . . . it will be how what is proffered interacts with the intellectual tools that the decisionmaker brings to bear on the problem. These tools will include the decisionmaker's understanding, knowledge, judgement, and experience.

Allen, *A Reconceptualization of Civil Trials*, *supra* note 155, at 433 n.71.

235. FEAGIN & SIKES, *supra* note 168, at 22. The pervasiveness of racism is of course a central tenet of the critical race theorists. For a bibliography, see Brooks, *supra* note 10, at 159 n.1.

For a contrary view of the problem of juror bias, see Judge Goettel's observation in *Felker v. Pepsi-Cola Co.*, 899 F. Supp. 882, 891 (D. Conn. 1995):

In the last few years, I have presided over a number of employment discrimination cases with juries. In most of those cases the jury focused on determining whether the adverse employment action (usually discharge) was proper in their opinion. Not surprisingly, since most of them are or have been employees and few of them have been employers, they have found that the employment action was wrong. Having so found, they move on to the conclusion that it must have been due to the type of claimed discrimination—race, sex, religion, national origin or age—even though the evidence supporting that conclusion is very slight. Stated more simply, if the jury finds that the employee should not have been discharged it will "usually" (i.e. generally) infer impermissible employment discrimination.

There is some statistical data indicating that employment discrimination plaintiffs fare better in front of juries than they do in bench trials. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 41-42 (1996).

236. FEAGIN & SIKES, *supra* note 168, at viii.

237. See *id.* at 3, 11. See also Calloway, *supra* note 116, at 1023-25, 1028-30. As the perception of whites that blacks pose a real threat to their economic well-being increases, whites react with "predictable hostility." See Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 415 (1981). Between

Similarly, recent polls indicate that nearly half of Americans believe the ideal family structure is one in which the father earns the living and the mother stays home with the children.²³⁸ What are the implications of such views when a jury, drawn from a cross-section of the community, is asked to decide a gender discrimination case (particularly where the female plaintiff seeks work in a non-traditional occupation)?

The concern that racial prejudice among jurors might undercut the effectiveness of civil rights damage actions was one of the reasons jury trials have not generally been mandated by statute.²³⁹ And the Supreme Court has itself recognized "the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled."²⁴⁰

Regarding the other players in the judicial system, Justice Marshall observed this phenomenon in the context of peremptory challenges:

It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen" or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . . Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.²⁴¹

one third and two thirds of the white respondents surveyed by Kinder and Sears "believed that blacks get more than they deserve, push themselves where they are not wanted, milk welfare programs, or get more attention from government than they should." *Id.* at 421.

For an excellent summary of the survey literature on unconscious discriminatory attitudes in America, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-58 (1996).

238. See Tamar Lewin, *Americans Attached to Traditional Role for Sexes, Poll Finds*, N.Y. TIMES, March 27, 1996, at A15.

239. See *Curtis v. Loether*, 415 U.S. 189, 191-92 (1974) (Title VIII of the Civil Rights Act of 1968).

240. *Id.* at 198. While the jury in a criminal case has been viewed as having the constitutional authority to nullify the law, see, e.g., *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) (the criminal jury, as the conscience of the community, may acquit for reasons of generosity, mercy, sympathy, or because they think the law is wrong), the civil jury has no similar prerogative. See generally Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process: The Case for the Fact Verdict*, 59 CINN. L. REV. 15, 29-30 (1990) [hereinafter Brodin, *Accuracy, Efficiency, and Accountability*]; Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEORGE WASH. L. REV. 723, 729 (1993); Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281, 1284-85 (1993); Chaya Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990).

241. *Batson v. Kentucky*, 476 U.S. 79, 106-07 (1986) (Marshall, J., concurring) (citations and internal quotations omitted). Judges of course are not without their own biases which can influence their factfinding. See generally FRANK, *supra* note 202, at 100-15. "[I]n the last push, a judge's decisions are the outcome of his entire life-history." *Id.* at 115.

In sum, the personality excuse which received the Court's imprimatur in *Hicks* provides convenient cover for a fact-finder influenced by those prejudices so prevalent in our society. Where it is raised,²⁴² courts should carefully scrutinize the evidence to detect any indication that the personality defense is in fact a reflection of racial or gender bias (something that was not apparently done in many of the cases discussed above). Because the "source of an employer's hostility toward an employee is inevitably opaque,"²⁴³ it would be appropriate to shift the burden to the employer raising the defense to prove that the personality conflict is not a result of racial or gender bias.²⁴⁴

D. The Absence of a Workable Standard: When Will Pretext Equal Discrimination?

McDonnell Douglas equated a finding of pretext with a finding of discrimination. *Hicks* holds that the two *may be*, but are *not necessarily*, the same. There is, in other words, an undefined gap between pretext and discrimination that will appear in some, but not all, cases. In light of the admonition in *Hicks* that no additional evidence is necessary to turn pretext into discrimination, the obvious question arises as to when *does* pretext equal discrimination.²⁴⁵ Deborah Malamud, a supporter of *Hicks*, concedes that the decision "has left the courts in complete disarray as to what the plaintiff needs to do to prove pretext."²⁴⁶ This situation is somewhat ironic given Justice Scalia's avowed concern for predictability and certainty in the law.²⁴⁷

242. It should go without saying (but no longer does) that courts should not be permitted to raise the defense *sua sponte* as Judge Limbaugh did. See *supra* text accompanying notes 135-164.

243. *Walker v. Nationsbank of Florida N.A.*, 53 F.3d 1548, 1563 (11th Cir. 1995) (Johnson, J., concurring).

244. "Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." *International Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977).

245. Professor Malamud recognizes the problem, but only in the context of "direct" proof: "[I]t would make no sense to say that the plaintiff who has persuaded the court [with direct proof] that a discriminatory reason more likely motivated the employer *may* succeed but also may *not* succeed depending on the circumstances." Malamud, *supra* note 92, at 2267 n.127 (internal quotations omitted).

246. *Id.* at 2305. One pre-*Hicks* court struggling with the proof problem mused:

Besides rebutting an employer's proffered reasons for firing a plaintiff, the evidence must ultimately be sufficient to permit the factfinder reasonably to infer that plaintiff was fired because of his age. Proof along these lines need not be of the "smoking gun" variety and, in some factual settings, the mere showing of the falsity of the employer's stated reasons may, along with the other facts and circumstances in the case, give rise to a reasonable inference of age discrimination. But this is not a matter that can be addressed by formula. For a plaintiff to prevail on his ultimate burden, the totality of the circumstances must in each case create a reasonable inference that the employer's stated reasons were a pretext for unlawful [age] discrimination.

Connell v. Bank of Boston, 924 F.2d 1169, 1175 (1st Cir. 1991).

247. Scalia's views have been described by an admirer as follows: He believes in the use of rules instead of balancing tests, because rules are

Take for example *Rhodes v. Guiberson Oil Tools*,²⁴⁸ in which the defendant employer appealed from the denial of its motion for a JNOV to set aside a jury verdict in favor of the plaintiff in an age discrimination action brought under the ADEA. Rhodes, a 56 year-old salesman, had been told at the time of his termination that it was because of a reduction in force, but within two months he had been replaced by a 42-year-old.²⁴⁹ Guiberson abandoned the original explanation at trial and instead asserted Rhodes was discharged for poor work performance.²⁵⁰ The *en banc* Fifth Circuit concluded that the jury was entitled to find that both reasons were pretextual, and that the evidence thus supported the verdict for plaintiff. Rhodes' case included one item of direct evidence: a statement made by the Guiberson official who initiated plaintiff's termination that "he could hire two young salesmen for what some of the older salesmen were costing."²⁵¹

The Fifth Circuit grappled with the indeterminacy of the *Hicks* conception of proof, and splintered into disagreement. If proof of pretext *permits but does not require* a finding of discrimination, the Court acknowledged, it remains "unclear. . . whether [*Hicks*] intended that in all such cases in which an inference of discrimination is permitted a verdict of discrimination is necessarily supported by sufficient evidence."²⁵² The majority supplied a correspondingly indeterminate answer: "[T]he question does not yield a categorical answer. Rather, we are convinced that ordinarily such verdicts would be supported by sufficient evidence, *but not always*."²⁵³

While eschewing any requirement that a plaintiff provide direct evidence to sustain a finding of discrimination ("*Hicks* does not cast aside circumstantial evidence as a means of allowing a factfinder to infer discrimination"),²⁵⁴ the majority explained:

The evidence necessary to support an inference of discrimination will vary from case to case. A jury may be able to infer discriminatory intent in an

predictable; they constrain future decisionmakers so they cannot introduce their own personal preferences into the decision; they enhance the legitimacy of decisions because they make it clear to litigants that their case was decided through neutral application of a rule rather than on the basis of a judge's personal preference; and lastly, they embolden the decisionmaker to resist the will of a hostile majority.

Alex Kozinski, *My Pizza with Nino*, 12 CARDOZO L. REV. 1583, 1588-89 (1991).

248. 75 F.3d 989 (5th Cir. 1996).

249. *See id.* at 995. It was uncontradicted at trial that Guiberson knew at the time of plaintiff's termination or soon after that he would be replaced.

250. *See id.* This explanation was also contradicted by evidence at trial from plaintiff's customers and supervisors. *See id.* at 995-96.

251. *Id.* at 996.

252. *Id.* at 993.

253. *Id.* (emphasis added). "In tandem with a *prima facie* case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence." *Id.* at 994. Writing separately, three judges took issue with the conclusion that a *prima facie* case plus evidence of falsity would "ordinarily" or "usually" support a verdict for the plaintiff. *See id.* at 997-98.

254. *Id.* at 993.

appropriate case from substantial evidence that the employer's proffered reasons are false. The evidence may, for example, strongly indicate that the employer has introduced fabricated justifications for an employee's discharge, and not otherwise suggest a credible nondiscriminatory explanation.

By contrast, if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent. . . . In some cases, for instance, the fact that one of the nondiscriminatory reasons in the record has proved highly questionable may not be sufficient to cast doubt on the remaining reasons. Likewise, an employer's explanation for its proffer of a pretextual reason may preclude a finding of discrimination [where, for example, the evidence indicates the false reason was designed to conceal the employer's own act of embezzlement or to protect a business secret or the reputation of another employee].²⁵⁵

The three concurring judges summed up the circular analysis:

When the plaintiff-employee is relying solely upon evidence tendered to establish a prima facie case and evidence that the employer's articulated reason for the employment decision is false, that evidence must also be sufficient to independently support the additional inference that the false reason was offered as a pretext for the employer's unlawful and intentional discrimination on the basis of age.²⁵⁶

Concurring specially, Judge Garza disagreed with the space left open between a finding of pretext and a finding of discrimination.²⁵⁷ Unlike the majority, he concluded that disbelief of the reasons put forward by the defendant together with the evidence that established the prima facie case "will *always* allow a jury to arrive at a verdict of intentional discrimination, regardless of facts and inferences to the contrary."²⁵⁸ In other words, it is the jury's call—if it chooses to equate pretext with discrimination, its verdict must always stand.

The Second Circuit confronted the same question in *Binder v. LILCO*,²⁵⁹ and came up with a similarly unhelpful answer. Reversing a JNOV for the employer and reinstating the jury verdict for plaintiff in this age discrimination case, the court held that the jury was entitled to conclude that defendant's explanations were pretextual and to draw the permissible inference of discrimination. The court rejected defendant's argument that "some affirmative evidence of discrimination," in addition to the finding of pretext, is necessary to support a verdict for a plaintiff,²⁶⁰ yet offered little further guidance:

255. *Id.* at 994 (citations omitted).

256. *Id.* at 1000 (Demoss, J., concurring in part and dissenting in part).

257. *See id.* at 997-99.

258. *Id.* at 998 (emphasis added).

259. 57 F.3d 193 (2d Cir. 1995).

260. *See id.* at 199.

A trier may thus generally infer discrimination when it finds that the employer's explanation is unworthy of credence. . . . Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct. In so stating, we do not exclude the possibility that an employer may explain away the proffer of a pretextual reason for an unfavorable employment decision. Such an explanation might include, for example, protection of a business secret or even protection of the reputation of an employee who had engaged in undesirable conduct. No such explanation was offered in the instant matter.²⁶¹

The court emphasized, however, that proof of pretext does not *compel* a finding for plaintiff, thus again leaving the relation between pretext and discrimination frustratingly indeterminate.

Further muddying the picture is Justice Scalia's opaque suggestion in *Hicks* that there are different degrees of falsehood: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if the disbelief is accompanied by a *suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination."²⁶² Since a finding of pretext already carries with it a determination that the employer has manufactured false reasons for the challenged action, what *more* is needed to raise "a suspicion of mendacity?"

How have the courts handled this elusive concept? In *Walker v. Nationsbank of Florida N.A.*,²⁶³ the Eleventh Circuit affirmed a directed verdict for the defendant granted at the close of plaintiff's evidence, finding that although the employer's explanation for plaintiff's termination appeared to be pretextual,

Walker did not produce evidence that raised a suspicion of mendacity sufficient to permit us to find on this record that the bank intentionally discriminated against her on the basis of her age and/or sex. The record raises a suspicion of mendacity, but suspicion will not allow Walker to prevail under Title VII of the ADEA.²⁶⁴

This perplexing juxtaposition seems to take *Hicks* yet a step further into the abyss by suggesting that even a showing of pretext *plus* suspicion of mendacity is not sufficient to prove intentional discrimination if the level of suspicion (or mendacity?) is not high enough.

To Senior Circuit Judge Johnson, the court had "improperly heighten[ed]" the plaintiff's burden of proof.²⁶⁵ Observing that "*Hicks* leaves unresolved whether where the plaintiff has supplied sufficient evidence for a jury to disbelieve the reasons proffered by the employer, a judge may find as a matter of law that the evidence is insufficient for a reasonable

261. *Id.* at 200.

262. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (emphasis added).

263. 53 F.3d 1548 (11th Cir. 1995).

264. *Id.* at 1558.

265. *Id.* at 1560 (concurring specially).

jury to infer discriminatory intent," Judge Johnson then traced the "uncertainty that *Hicks* has generated in the lower federal courts."²⁶⁶ He concludes that a judge may not direct a verdict against a plaintiff who has demonstrated pretext.²⁶⁷

When *Hicks* held that a factfinder could find pretext and yet reject the plaintiff's claim of discrimination, it was dealing with a case tried to a judge in the era before Title VII jury trials. As factfinder a judge is required by Federal Rule of Civil Procedure ("FRCP") 52(a)²⁶⁸ to specifically set forth findings of fact, thus assuring that we will know the basis for the ultimate conclusion reached. Juries, on the other hand, are typically asked to render a general verdict and are not required to specify their findings; consequently we will not know the basis for their decision.²⁶⁹

In outlining the "substantial practical difficulties" anticipated in operating under the *Hicks* regime, Judge DeMoss in *Rhodes v. Guiberson Oil Tools*²⁷⁰ wrote:

Prior to 1991, when Title VII discrimination cases were tried to the judge, we might have reasonably expected that a trial judge would prepare sufficiently detailed findings of fact and conclusions of law tracking relevant liability issues. [It was in fact the detailed findings of the trial judge in *Hicks* which presented the controversy as to which were controlling.] However, since 1991 for Title VII cases, and historically in ADEA cases, the factfinder is the jury. Title VII cases are typically submitted to the jury on the single issue of "intentional discrimination," while ADEA cases are typically submitted to the jury on the dual issues of liability for discrimination and the issue of willfulness.

Generally, there are no separate issues submitted which require the jury to determine which reason or reasons have been offered by the employer as an explanation for its actions. Likewise, there is usually no additional finding on the issues of whether the jury disbelieved or rejected such reasons nor whether the jury found any "suspicion of mendacity."²⁷¹

Judge DeMoss thus posed the following as yet unanswered questions: 1) How does a reviewing judge determine from the record that the jury disbelieved or rejected all of the employer's reasons? 2) Is there any differ-

266. *Id.* at 1561.

267. *See id.* at 1562-63. Other circuit courts have recently weighed in on what the Third Circuit refers to as the "continuing and perplexing problem[s]" left open by *Hicks*. Compare *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1065 (3d Cir. 1996) (concluding that evidence supporting prima facie case coupled with finding that employer's explanation is pretextual is sufficient to support verdict of discrimination) with *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) (holding that a directed verdict may be entered against a plaintiff even if the evidence is sufficient to allow the jury to disbelieve the employer's explanation).

268. "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

269. *See generally* Brodin, *Accuracy, Efficiency, and Accountability*, *supra* note 240.

270. 75 F.3d 989 (5th Cir. 1996).

271. *Id.* at 1002-03 & n.4.

ence between a factfinder's "disbelief" of the employer's reasons and a factfinder's "rejection" of the employer's reasons? 3) How does a reviewing judge determine whether the factfinder's disbelief was accompanied by a "suspicion of mendacity"? 4) How can a reviewing judge determine whether the factfinder did, in fact, draw the additional required inference of intentional discrimination.²⁷² Given the impenetrable nature of their verdict, we will not even know whether the jury (like Judge Limbaugh) rejected both party's version of events and speculated as to another explanation for the termination.

Special verdicts and interrogatories accompanying a general verdict (see FRCP 49) may prove useful in recording the findings of the jury,²⁷³ but these devices are not without their own serious shortcomings and potential for misuse and abuse.²⁷⁴ And in any event, the level of specificity and factual detail revealed by special verdicts is not likely to parallel that offered by a judge's findings of fact.²⁷⁵

The importance of specific factual findings was recently noted by the First Circuit in the context of juror strikes:

[A] district court should state whether it finds the proffered reason for a challenged strike to be facially race neutral or inherently discriminatory and why it chooses to credit or discredit the given explanation. Indicating these findings on the record has several salutary effects. First, it fosters confidence in the administration of justice without racial animus. Second, it eases appellate review of a trial court's *Batson* ruling. Most importantly, it ensures that the trial court has indeed made the crucial credibility determination that is afforded such great respect on appeal.²⁷⁶

Such a record will not be obtained in Title VII jury trials.

The ultimate jury control devices are of course the directed verdict and the JNOV.²⁷⁷ As one court has noted, however, there are "special difficul-

272. See *id.* at 1003.

273. See Karen W. Kramer, Note, *Overcoming Higher Hurdles: Shifting the Burden of Proof After Hicks and Ezold*, 63 GEO. WASH. L. REV. 404, 440-43 (1995). For an example of the use of special interrogatories accompanying a general verdict, see *Neufeld v. Searle Labs.*, 884 F.2d 335 (8th Cir. 1989).

274. See generally Brodin, *Accuracy, Efficiency, and Accountability*, *supra* note 240, at 29-30. In *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995), the district judge submitted supplemental interrogatories to the jury after they returned general verdict for plaintiff. The Second Circuit wrote: "[T]here is no authority upholding the submission of fact-specific interrogatories to a jury after a general verdict has been returned, and we note our disapproval of this procedure absent extraordinary circumstances." *Id.* at 199.

275. See Brodin, *Accuracy, Efficiency, and Accountability*, *supra* note 240, at 84-90.

276. *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994).

277. The standard for judgment as matter of law under FRCP 50(a) has been stated as follows: "There is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of sheer surmise and conjecture, or that the evidence be so overwhelming that reasonable and fair minded persons could only have reached the opposite result." *Binder*, 847 F. Supp. 1007 (E.D.N.Y. 1994), *rev'd on other grounds*, 57 F.3d 193 (2d Cir. 1995) (internal quotes & citations omitted). See also Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Jury*

ties and concerns in making [the JNOV] determination in the employment discrimination area, where subtleties of motive and intent abound.”²⁷⁸

Another obvious problem regarding Title VII jury trials under the *Hicks* regime is the critical question of how juries will be instructed. The level of complexity surrounding the original *McDonnell Douglas/Burdine* structure has led some to conclude that it should not be included in jury instructions.²⁷⁹ *Hicks* adds yet another level of complexity and ambiguity by requiring the judge to further instruct that the jury *may, but need not*, find discrimination from a finding of pretext.²⁸⁰ But what guidance, if any, will the jury receive on when to make the equation and when not to?²⁸¹ Will the instructions explicitly advise the jury that they can reject both party’s story and adopt one of their own creation?

In his brief before the Supreme Court, Melvin Hicks argued prophetically that “it would be particularly ill-advised” to undo the *McDonnell Douglas* structure “just as Congress has provided a right to jury trials in

Verdicts, 28 CREIGHTON L. REV. 683, 708 (arguing that courts are “empowered to ignore irrational or illogical jury verdicts.”).

278. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). The court observed that “in the discrimination area the danger of improvidently sending a case to the jury is amplified by the inherent difficulties in conclusively proving matters of motive and intent.” *Id.* (citation omitted). “To guard against the danger that the jury will reach a decision on the basis of mere speculation or sympathy,” the JNOV is a particularly appropriate jury control device in discrimination cases. *Id.* at 458. Affirming the JNOV in that case, the court noted that the jury “may have been impermissibly swayed by [plaintiff’s] emotional testimony.” *Id.* at 459. What about the risk of unfair hostility *against* the plaintiff’s case?

279. See *Cabrera v. Jakobovitz*, 24 F.3d 372, 380 (2d Cir. 1994) (“Much of the difficulty in this case arises from the fact that language used by appellate courts to formulate burdens of proof and production in the context of bench trials has been imported uncritically into jury charges. . . . [T]he standards that must guide a judge during a bench trial are not necessarily helpful or even appropriate for inclusion in jury charges.”); *Devitt*, *supra* note 96, § 104.01 (for “reasons of clarity and simplicity the text instruction does not attempt to submit to the jury the evidentiary analysis set forth in *McDonnell Douglas Corp. v. Green*.”) & Supp. 1996 § 104.04 (the shifting burdens are intended to aid the judge in organizing the evidence presented, and are beyond the function and expertise of the jury). Compare *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200-01 (1st Cir. 1987) (*McDonnell Douglas* structure “is a straightforward way of explaining how to consider whether there is intentional discrimination in situations where such discrimination is not likely to be overt. Thus, the district court was correct in using the framework in the instructions to the jury.”).

280. In a typical post-*Hicks* charge, U.S. District Judge Lindsay instructed the jury in a pregnancy discrimination action: “If you disbelieve the reasons put forward by the defendant for its terminating the plaintiff’s employment, *you may, but are not required to*, consider the fact that the defendant has put forward a pretext or false reason for discharging the plaintiff as evidence that intentional discrimination existed.” *Carangelo v. MCI Telecomms. Corp.*, C.A. 93-11714-RCL (D. Mass. 1995) (emphasis added) (unpublished opinion).

281. In *Rowlett*, *supra* note 279, for example, the jury came back with the following question for the judge:

Point of law. Your charge to the jury was, first, the plaintiff must establish that he was treated differently; second, the defendant gives reasons for those differences; third, the plaintiff must then show evidence that those reasons were pretexts. Question: If these three points have been established on a complaint has “purposeful racial discrimination” then been established in that complaint?

832 F.2d at 201.

Title VII" cases.²⁸² Litigants and courts are living daily with the consequences of the refusal to heed that warning.

V

THE PROGNOSIS FOR CIRCUMSTANTIAL PROOF

Justice Harlan recognized the key role played by circumstantial proof in cases alleging discriminatory motivation when he wrote the opinion of the Court reversing a grant of summary judgment against Sandra Adickes, a Freedom School teacher arrested in Hattiesburg, Mississippi in August, 1964.²⁸³ In her effort to prove a conspiracy to retaliate against her for her civil rights work, Adickes relied on classic circumstantial proof—the suspicious sequence of events beginning with the ejection of her class from the town library and culminating in her arrest after the group was refused service at a segregated lunch counter. The mere presence of a police officer in the restaurant at the time, the Court held, was sufficient under the circumstances to raise an inference that there was a “meeting of the minds” between the police and restaurant management.²⁸⁴

Hicks is only one example of a judicial reaction against such proof in civil rights litigation. The Fifth and Seventh Circuits have required “direct” evidence of discriminatory motivation in Title VII wage equity cases.²⁸⁵ These decisions rely on Justice Rehnquist’s dissent in *County of Washington v. Gunther*,²⁸⁶ which would limit Title VII’s applicability to those wage equity cases where “there is *direct evidence* that an employer has *intentionally* depressed a woman’s salary because she is a woman.”²⁸⁷

Beyond the Title VII sphere, the D.C. Court of Appeals recently ruled that plaintiffs in §1983 civil rights cases must offer direct evidence of unlawful intent in order to avoid summary dismissal.²⁸⁸

Where the defendant’s subjective intent is an essential component of plaintiff’s claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional

282. Brief for Respondent at 31, *St. Mary’s Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993) (No. 92-602).

283. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

284. See *id.* at 158.

285. See *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 342-43 (7th Cir. 1988); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133 (5th Cir. 1983).

286. 452 U.S. 161 (1981).

287. *Id.* at 204.

288. See *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *vacated and remanded on other grounds*, 115 S. Ct. 2552 (1995). *Kimberlin*, a federal prisoner, alleged that his First Amendment rights were violated when prison officials placed him in administrative detention to prevent him from telling the media his story that he sold marijuana to Dan Quayle, then Republican candidate for Vice President.

motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.²⁸⁹

Explicitly relying on *Hicks*, the court observed that "none of the evidence Kimberlin cites does more than cast doubt on the appellants' stated reasons for their actions—it does not constitute direct evidence that they acted out of any impermissible motive. . . ." ²⁹⁰

The "direct evidence only" rule drew a sharp dissent from Harry T. Edwards, who argued that it was a "nonsensical notion" with "no foundation in reason or in the case law."²⁹¹ Like Harlan in *Adickes*, Judge Edwards found that the timing of Kimberlin's detentions supported an inference that they were intended to silence him. "This inference is further supported," he concluded, "by the conflicting, and seemingly pretextual, explanations offered by [the defendants] regarding the reasons for Kimberlin's detentions."²⁹²

It was "incomprehensible" to Judge Edwards "why this court would want to adopt a test that compels plaintiffs to base their pleadings on 'direct evidence' or suffer dismissal—unless the court intends to eliminate all civil rights actions involving unconstitutional motive."²⁹³ "[T]he probative value of circumstantial evidence is intrinsically no different from testimonial evidence, and can in some cases be more certain, satisfying and persuasive than direct evidence."²⁹⁴ And "a defendant's state of mind is typically established by circumstantial evidence because of the difficulty in obtaining direct evidence of motive."²⁹⁵

VI

CONCLUSION

Given the depth of the problem, it was no doubt unrealistic to expect Title VII to completely achieve its stated purpose, namely, the elimination of discrimination in the American workplace.²⁹⁶ Nonetheless the persistence of widespread inequality so many years later is deeply troubling. Unemployment among blacks remains twice the rate of whites.²⁹⁷ Substantial

289. *Id.* at 795 (citation omitted).

290. *Id.* at 796. For an exploration of the Talmud's absolute prohibition against the use of circumstantial proof in criminal cases, see Rosenberg & Rosenberg, *supra* note 163.

291. *Kimberlin*, 6 F.3d at 799, 804 (dissenting opinion).

292. *Id.* at 801.

293. *Id.* at 808.

294. *Id.* (internal quotations and citations omitted).

295. *Id.* at 809. Judge Williams also wrote a separate opinion criticizing the distinction drawn between direct and circumstantial evidence as "completely arbitrary and unrelated to the strength of the plaintiff's case," and one that "would be fatal except in the rare case of the defendant's confession." *Id.* at 798.

296. See H.R. Rep. No. 914, at 18 (1963), reprinted in 1964 U.S.C.A.N. 2391, 2393.

297. Labor Department statistics for October, 1996, for example, reveal an unemployment rate of 4.4% for whites, 10.8% for blacks, and 8% for Latinos. See Robert A. Rosenblatt, *Economy Adds 210,000 Jobs in October as Campaign Wanes*, L.A. TIMES, Nov. 2, 1996, at D1.

wage disparities continue to separate men and women, whites and blacks.²⁹⁸ African-American males on average earn 78 cents for each dollar earned by a white male; for white women the figure is 73 cents, for African-American women 59 cents.²⁹⁹ The \$25,914 average salary for an African-American female college graduate is less than the \$28,266 of a white male *high school* graduate.³⁰⁰ Working women and minorities continue to occupy the lowest rungs of the labor market ladder.³⁰¹

Compelling evidence exists that in many employment contexts, males and whites are still (because of both internal and external pressures) generally preferred to females and blacks.³⁰² Even a manager not personally inclined to discriminate may do so when it is perceived that superiors or clients serviced by the company expect it.³⁰³ As two researchers have put it, "[c]learly, no amount of hard work and achievement, no amount of money, resources, and success, can protect black people from the persisting ravages of white racism in their everyday lives."³⁰⁴

Title VII thus continues to serve a vital role in protecting and enforcing equal opportunity. It has been observed that "middle-class blacks [depend to a large extent] on civil rights legislation and court enforcement of such laws to develop white-collar careers in traditionally white workplaces."³⁰⁵ But "[s]eeking redress from discriminators in court, even if one wins, can be devastating professionally and personally. Given the isolation and possibility of retaliation, it is surprising that some middle-class black employees muster the courage to seek legal redress and jeopardize their current situations."³⁰⁶

The new barriers imposed by *Hicks* are certain to discourage victims and their lawyers from filing cases.³⁰⁷ At the same time, the Supreme

298. See generally 1 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 2.09, at 2-44-2-45 (2d ed. 1996) (summarizing labor market reports).

299. See Derrick Z. Jackson, *Facts Favor Affirmative Action*, BOS. GLOBE, Oct. 30, 1996, at A17 (census data).

300. See *id.*

301. See Diane E. Lewis, *Census: Men Still Get Top Jobs, Biggest Salaries*, 1996, BOS. GLOBE, October 22, 1996, at C6.

302. See Larwood, *supra* note 122, at 25. For a discussion of the recent scholarship on institutional discrimination, see Grace Hall Saltzstein, *Personnel Directors and Female Employment representation: A New Addition to Models of Equal Employment Opportunity Policy*, 64 SOC. SCI. Q. 734 (1983).

303. See Larwood, *supra* note 122, at 26-27.

304. FEAGIN & SIKES, *supra* note 168, at ix. By way of example, Alan Keyes, an African-American who was a conservative candidate for the presidency in 1996, was arrested outside a TV studio in Atlanta and charged with criminal trespass when he tried to attend a candidates debate inside. See Curtis Wilkie, *Buchanan Rapped for Israel Stance; Forbes Looks Beyond South in Ga. Debate*, BOS. GLOBE, Mar. 4, 1996, at 6.

305. FEAGIN & SIKES, *supra* note 168, at 185.

306. *Id.* at 293.

307. Even before *Hicks*, getting lawyers to file discrimination cases was no easy task. See, e.g., Dominic Bencivenga, *Glass Ceiling Verdict: Employment Bar Jolted by \$5 Million Award*, 214 N.Y.L.J. 5 (1995) (reporting on the reluctance of lawyers to bring "glass ceiling" gender cases because of the difficulties of proof); Steven A. Holmes, *Workers Find It Tough Going Filing Lawsuits Over Job Bias*,

Court's increasingly cabined reading of Title VII is bound to give comfort to those employers and supervisors who might otherwise fear being called into court to account for their conduct. The decision stands as a veritable guide for avoiding liability. Title VII should not become the vehicle for legitimating the very conduct it is directed towards prohibiting.³⁰⁸

Discriminatory treatment cases such as *Hicks* do not involve sophisticated statistical proof, nor do they raise the highly-charged questions surrounding affirmative action and group-based relief to non-victims. If Title VII cannot protect persons from garden-variety disparate treatment in the workplace, then the statute is indeed both an empty promise and a cruel hoax.³⁰⁹

The challenge to the use of circumstantial proof in civil rights cases is, as Judge Harry Edwards noted above,³¹⁰ a challenge to the very enforcement of the rights asserted. To date, legislative efforts to overturn *Hicks* have stalled.³¹¹ As long as *Hicks* remains controlling law, the great effort to achieve true equal opportunity in the workplace is at risk for failure.

N.Y. TIMES, July 24, 1991, at A1 (same, for discrimination cases in general). No doubt the low success rate for such cases has discouraged counsel. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1588 (1989) (finding a 22.2% success rate at trial for employment discrimination cases); Selmi, *supra* note 235, at 41 (success rate of 30%, compared with success rate in most tort cases of approximately 50%).

Professor Essary argues persuasively that it was the intent of the majority in *Hicks* to discourage the filing of cases. Reviewing several amici briefs filed in the case which argued that the federal courts were being clogged with meritless discrimination claims brought by disgruntled employees, she concludes that the Court came to believe that frivolous claims were "commonplace." See Essary, *supra* note 143, at 388 n.11, 393. Judge Richard Posner had earlier alluded to "[t]he workload of the federal courts, and the realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law." Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

308. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For a discussion of the positive influence of law in changing discriminatory behavior as well as attitudes, see *Race Relations: Social-Psychological Aspects*, 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 277 (1968).

Deborah Calloway has written: "When the Supreme Court in *Hicks* refused to recognize a presumption of discrimination based on a prima facie case and a discredited nondiscriminatory explanation, the Court both questioned the continued prevalence of discrimination and invited lower court judges and juries to do the same." See Calloway, *supra* note 116, at 998.

309. It has been reported that well over 90 percent of all employment discrimination cases allege disparate treatment, while less than 2 percent involve disparate impact. See Krieger, *supra* note 15, at 1162-63.

310. See *supra* note 293.

311. The Employment Discrimination Evidentiary Amendment of 1993 would have provided that a case of unlawful employment practice is made out if: (1) the complaining party proves by a preponderance of the evidence a prima facie case that the respondent engaged in such practice; and (2) either the respondent cannot rebut such case, or the respondent produces evidence of one or more nondiscriminatory reasons for the conduct alleged to be unlawful and the complaining party demonstrates that each of such reasons is not true, but a pretext for discrimination that is the unlawful employment practice. H.R. 2787, 103d Cong. (1993). The Bill died in committee.

For a critique of the proposal as not completely accomplishing the goal of overturning *St. Mary's Honor Center v. Hicks*, see Essary, *supra* note 143, at 443-45.